(24,049)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 356.

THOMAS CHRISTIANSON, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF KING.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 3, 1914.

a No. —.

THOMAS CHRISTIANSON, Plaintiff in Error,
vs.
THE COUNTY OF KING, Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

1 In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1969.

THOMAS CHRISTIANSON, Plaintiff in Error,
vs.
THE COUNTY OF KING, Defendant in Error.

Names and Addresses of Counsel.

Edward Judd, Esq., 620 New York Block, Seattle, Washington, Attorney for Plaintiff in Error.
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Robert H. Evans, Esq., 400 Melhorn Building, Seattle, Washington, Attorney for Defendant in Error.

2 In the United States Circuit Court of the Western District of Washington, Northern Division.

No. 1969.

THOMAS CHRISTIANSON, Plaintiff,
vs.
THE COUNTY OF KING, Defendant.

Complaint.

And now comes the plaintiff and complains of the defendant as follows:

I.

That the plaintiff is a subject of the King of Norway.

II.

That the defendant is a municipal corporation, organized under the laws of the State of Washington, and is a citizen of the State of Washington.

III.

That the controversy in this action is between a subject of a foreign government and citizen of the State of Washington, and of the United States of America. That the matter in dispute and controversy in this action, exclusive of interest and costs, exceeds in value the sum of Three Hundred Thousand Dollars ($300,000).

IV.

That during the month of March, 1865, one, Lars Torgerson Crotnes, departed this life in the County of King in the Territory of Washington, intestate, and being at the time of his death a resident of the County of King. That at the time of his death, said Lars Torgerson Crotnes was commonly known in the neighborhood where he resided by the name of John Thompson.

V.

That prior to his death, said Lars Torgerson Crotnes had become the owner in fee under a chain of mesne conveyances from
3 the United States of America, of a certain tract or parcel of land, the title to which was conveyed to him under the name of John Thompson, which tract or parcel of land is located in the County of King and State of Washington, and more particularly described as follows, to-wit:

Beginning at a post on the right bank of Duwamish River, the same being the Southwest corner of the Original Donation Land Claim of Luther M. Collins, in Township 24 North of Range 4 East, in Section 29; running thence east along the south boundary of said claim, and the north boundary of J. Bush's claim 14 chains and 3 links; thence north 13 deg. 04' east, 124 chains to the north line of said claim, so as not to enclose any of the improvements upon the east half of that portion of said claim deeded by said L. M. Collins to Joseph Williamson and William Greenfield, thence west along the north line of said claim, 20 chains and 67 links to a post, the same being the northwest corner of said claim; thence south along the west boundary of said claim, 82 chains to a post on the right bank of the Duwamish River, being the southeast corner of Eli B. Maple's land claim; thence along the meanderings of said river to the southwest corner of said land claim, the place of beginning, so as to contain 160 acres.

VI.

That said Lars Torgerson Crotnes died a bachelor, leaving him surviving as his heirs at law, two brothers, one sister, and the children of a deceased sister, all of whom were subjects of the King of Norway. That the plaintiff is a son of a sister of said Lars

Torgerson Crotnes, and one of his heirs at law. That all the now living heirs at law of said Lars Torgerson Crotnes have by proper mesne conveyances, conveyed their right, title and interest in and to said lands above described to the plaintiff. That the plaintiff is now the sole owner in fee of said land.

VII.

That said Lars Torgerson Crotnes was born on or about the 30th day of August, 1829; in the City of Porsgrund, in the Kingdom of Norway. That the name of his father was Torger Engebretson Crotnes, and the name of his mother was Cathrine Grotnes. That at the age of about 21 years he shipped as a sailor from said city of Porsgrund and went by way of England to Australia, and thence in the year 1856, to the City of San Francisco, California. That while in the harbor of said last named city he fled from the sailing vessel on which he was a sailor because of abuse and ill treatment. That he changed his name from Lars Torgerson Grotnes to John Thompson in order to conceal his identity, so that he could not be apprehended and brought back to the vessel from which he had fled. That he came to the neighborhood of Elliott Bay in said King County, and resided in the neighborhood of the same King County and Kitsap County, in said State of Washington, until the time of his death in 1865. That he acquired the land above described under the name of John Thompson.

VIII.

That the heirs at law of said Lars Torgerson Grotnes had no knowledge of what had become of him, and did not learn about his death and the place in which he died, nor of the fictitious name which he had assumed, until within three years last past. That since learning thereof, such heirs, and particularly the plaintiff, have been diligently engaged in searching for and procuring the proper proofs of the identity of Lars Torgerson Grotnes and John Thompson, and his relationship to them.

IX.

That on the 26th day of March, 1865, one, Daniel Bagley, was duly appointed administrator of the estate of John Thompson, deceased, by the Probate Court of the County of King, in the Territory of Washington. That such proceedings were had in said estate in said Probate Court, that on the 26th day of May, 1869, a final decree of distribution was entered in said estate, in which it was recited that the administrator had on February 12, 1869, obtained an order of Court settling and allowing his final account, and recited that a time had been properly set for a hearing upon the entering of a decree of distribution in said estate and due and legal notice
5 of such hearing had been given, and after reciting the facts stated, said decree proceeded in the words and figures following to-wit:

"That said administrator had fully accounted to the Court for all of the said estate that has come into his hands and that the said estate, so far as discovered, has been fully administered and the residue thereof, consisting of property hereinafter mentioned, is ready for distribution; that all of the debts of the said deceased and of said estate and all the expenses of administration have been paid, and the said estate is in condition to be closed; that the decedent died intestate in the County of King, Territory of Washington, on the — day of March, 1865, leaving no heirs surviving him; there being no heirs of the said deceased, that the entire estate escheats to the County of King, Territory of Washington.

Therefore, on this 26th day of May, 1869, no objections being made or filed, it is hereby ordered, adjudged and decreed that all of the acts of said administrator as reported to this Court, and as appearing on the records thereof, be and the same are hereby approved and confirmed; that after deducting the estimated expenses of closing said estate, the residue of said estate of John Thompson, deceased, not heretofore distributed, hereinafter described, and now remaining in the hands of the said administrator, and any other property not now known or discovered, which may belong to the said estate or in which the said estate may have an interest, be and the same is hereby distributed as follows, to-wit:

The entire estate to the County of King, in Washington Territory.

The following is a particular description of the said residue of the said estate referred to in said decree and of which distribution is ordered, adjudged and decreed, to-wit:

160 acres of land on Duwamish River, more particularly described in a certain deed from Joseph Williamson and William Greenfield to Thompson dated January 19, 1865, and recorded in Volume 1 of Deeds, page 458 (and personal property).

Dated May 26, 1869.

THOMAS MERCER, *Judge.*"

6 That said decree was null and void, and said Probate Court was wholly without jurisdiction to in any manner vest, transfer, convey, fix or pass upon the title to the land described in said decree, and had no power or authority to declare said land escheated, which is the same land as above described.

That all claims to said land by the defendant, and all acts done by the defendant in reference to said land, and all control exercised or attempted to be exercised by the defendant over said land, have been made, done, performed and exercised, under and by virtue of said null and void decree above described.

That the defendant has not, and never has had any contract, deed, conveyance, decree, judgment, nor other writing, record or document evidencing, or purporting to evidence any title on its part in or to said land.

That the defendant has never at any time begun or instituted any suit or legal proceeding of any nature before any court, officer or tribunal, for the purpose of having an escheat of said land adjudi-

cated, adjudged or declared; nor has any other public authority or officer ever begun or instituted any such suit or legal proceeding.

That the defendant has never at any time begun or instituted any suit or legal proceeding of any nature, before any court, officer or tribunal, for the purpose of having any title, or claim of title, which it had or might have in said land established, approved, confirmed or quieted; nor has any other public authority or officer ever begun or instituted any such suit or legal proceeding.

X.

That after the entry of said decree, the land above described was marked upon the assessor's roll as county property and as exempt from taxation, and has ever since been so treated, except certain portions thereof hereinafter described, which the defendant has assumed to convey to private parties by deed.

That about the year 1885, the County of King, in the then Territory of Washington, took possession of a certain portion of the tract of land above described, which said portion remained in its
7 possession and after the organization of the State of Washington, has remained in the possession of the defendant, and is generally known as the "King County Farm," and is more specifically described as follows:

Beginning at a post on the right bank of the Duwamish River, the same being the southeast corner of the Original Donation Land Claim of Luther M. Collins, in Township 24 North, Range 4 East in Section 29; running thence east along the south boundary of said claim, and the north boundary of J. Bush's claim 14 chains and 3 links; thence north 13 degrees and 4′ east, to the east bank of the Duwamish River; thence in a Southwesterly direction along the meanderings of said river to the place of beginning.

That the same has never been used for any county purposes, but has been let out to tenants for the purpose of being farmed and producing a monetary income for the county.

That about the year 1900, the defendant took possession of a portion of the tract of land first above described, which portion is known as the "King County Hospital Grounds," and is more specifically described as follows:

Beginning at the southeast corner of block 6, in King County Addition to the City of Seattle, thence along the southwest side of said block 6 to the southwest corner of said Block 6; thence south to the east bank of the Duwamish River; thence in a southerly direction along the east bank of said Duwamish River to the point of its intersection with the west line of Charleston Avenue; thence in a northeasterly direction along the west line of Charleston Avenue to the place of beginning.

That the defendant has placed upon the last described tract of land valuable improvements in the shape of a hospital building and its appurtenances, the exact value of which are to the plaintiff unknown, and since thus taking possession of the last described tract, has been and now is using the same for county hospital purposes.

That in the year 1892, the defendant assumed to make a plat of a certain portion of the tract of land first above described, and caused the same to be called the "King County Addition to the City
8 of Seattle," and caused the same to be recorded in the office of the Auditor of King County in Volume VIII of Plats on page 59.

That the defendant has assumed to sell and convey to private parties all of the land composing said last named King County Addition, except such portion as is described as follows:

"Lots 1, 2, 3, 4, 8 and 9, in Block 5; Lots 5, 6, 7, 8, 9, in Block 7, which said Lots always have been and now are vacant and unoccupied and Lots 20 and 21, in Block 7, which last two lots were unoccupied and vacant until within less than ten years last past, but within the time last mentioned have been leased by the defendant to other parties to produce a monetary income."

That in the year 1903, the defendant had assumed to make a plat of a certain portion of the tract of land first above described and caused the same to be called "King County 2nd Addition to the City of Seattle," and caused the same to be recorded in the office of the Auditor of said King County, in Volume II of Plats, on page 1. That the defendant has assumed to sell and convey to private parties all of the land composing said last named King County 2nd Addition, except such portion as is described as follows:

Lots 1 to 9 both inclusive; Lots 13 to 16 both inclusive, and Lots 20 to 27 both inclusive, in Block 1; all of Blocks 2, 3 and 4; Lots 1 to 4 both inclusive; 8, 9, 12 to 16 both inclusive, and 21 to 25 both inclusive, all in Block 5; Lots 1 to 14 both inclusive, to 20 to 23 both inclusive, in Block 6; Lots 2, 6 to 9 both inclusive, and 18 to 20 both inclusive, all in Block 7; Lots 1 in Block 8; and Lots 2 to 5 both inclusive in Block 12, which said Lots always have been and now are vacant and unoccupied, and lots 10 to 12 both inclusive, and 17 to 19 both inclusive, all in Block 1, which 6 last described lots were unoccupied and vacant until within less than ten years last past, but within the time last mentioned have been leased by the defendant to other parties to produce a monetary income.

XI.

That the tracts of land hereinbefore described as the "King County Farm," "King County Hospital Grounds," "King County Addition to the City of Seattle" and "King County 2nd Addition to
9 the City of Seattle," together comprise the whole of the tract herein first above described as being the property belonging to Lars Torgerson Grotnes, except certain portions thereof which have been appropriated for public or quasi public purposes for railroad rights of way or highways.

XII.

That the plaintiff is entitled to recover from the defendant all of the buildings and improvements and tangible betterments which the defendant placed upon or attached to said land prior to the year 1903,

but the plaintiff hereby expressly disclaims all right to any such buildings, improvements or tangible betterments, and hereby admits and consents that the defendant may retain the same, or be reimbursed for the same out of the said land at the present value of said buildings, improvements and tangible betterments.

Wherefore, the plaintiff prays that he may recover from the defendant the land hereinbefore described as the "King County Farm;" the land hereinbefore described as the "King County Hospital Grounds;" the land hereinbefore stated not to have been assumed to be sold and conveyed by the defendant to private parties, which is located in said "King County Addition to the City of Seattle," and the land hereinbefore stated not to have been assumed to be sold and conveyed by the defendant to private parties, which is located in said "King County 2nd Addition to the City of Seattle;" that the title of the plaintiff to said land may be quieted and confirmed; that the plaintiff may recover of the defendant the costs of this action and that the plaintiff may have such other and further relief as to the Court may seem meet.

EDWARD JUDD,
S. S. LANGLAND, AND
W. A. KEENE,
Attorneys for Plaintiff.

P. O. Address: 620-621 New York Block, Seattle, Washington.

10 STATE OF WASHINGTON,
County of King, ss:

Thomas Christianson, being first duly sworn, on oath deposes and says, that he is the plaintiff in the above entitled action; that he has heard read the foregoing complaint, and knows the contents thereof, and believes the same to be true.

THOMAS CHRISTIANSON.

Subscribed and sworn to before me this 24th day of April, 1911.

[SEAL.] ANNA RASDALE,
Notary Public in and for the State of Washington, Residing at Seattle.

Indorsed: Complaint. Filed in the U. S. Circuit Court, Western District of Washington, Apr. 24, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

of England to Australia and thence to the City of San Francisco in the State of California, where he arrived in the year 1856. On his arrival in San Francisco he deserted the ship on which he was employed, because of abuse and ill treatment, and changed his name from Lars Torgerson Grotnes to John Thompson, in order to conceal his identity and thus avoid apprehension. He then came north to the vicinity of Elliott Bay, in King County, and resided in the counties of King and Kitsap, in the territory of Washington, until his death in the year 1865. While residing in King County he acquired title to one hundred and sixty acres of land, the greater part of which is now in controversy, under his assumed name of John Thompson. On the 26th day of March, 1865, one Daniel Bagley was appointed administrator of the estate of John Thompson, deceased, by the Probate Court of King County. Such proceedings were had in the settlement of the estate that on the 26th day of May, 1869, a final decree of distribution was entered which recited, among other things, that the administrator had obtained an order settling and allowing his final account on the 12th day of February, 1869; that a time had been fixed for hearing the application for a decree of distribution, and that due and legal notice of such hearing had been given. The decree then proceeded as follows:

"That said administrator has fully accounted to the Court for all of the said estate that has come into his hands and that the said estate, so far as discovered, has been fully administered and the residue thereof consisting of the property hereinafter mentioned, is ready for distribution; that all of the debts of the said deceased and of said estate and all the expenses of administration have been paid, and the said estate is in condition to be
14 closed; that the decedent died intestate in the County of King, Territory of Washington, on the — day of March, 1865, leaving no heirs surviving him; there being no heirs of the said deceased, that the entire estate escheats to the County of King, Territory of Washington."

Therefore on this 26th day of May, 1869, no objections being made or filed, it is hereby ordered, adjudged and decreed that all of the acts of the said administrator as reported to this Court, and as appearing on the records thereof, be and the same are hereby approved and confirmed; that after deducting the estimated expenses of closing said estate, the residue of said estate of John Thompson, deceased, not heretofore distributed, hereinafter described, and now remaining in the hands of said administrator, and any other property not now known or discovered, which may belong to the said estate or in which the said estate may have an interest, be and the same is hereby distributed as follows, to-wit:

"The entire estate to the County of King, in Washington Territory;

"The following is a particular description of the said residue of the said estate referred to in said decree and of which distribution is ordered, adjudged and decreed, to-wit:

"160 acres of land on Duwamish River, more particularly de-

scribed in a certain deed from Joseph Williamson and William Greenfield to Thompson, dated January 19, 1865, and recorded in Volume 1 of Deeds, page 458 (and personal property). Dated May 26, 1869."

The complaint then avers that this decree was null and void; that the Probate Court was without jurisdiction to declare an escheat; that all claims of the defendant and all acts done by the defendant in reference to the land in controversy have been done, performed and exercised under and by virtue of this void decree; that the defendant has no contract, deed, conveyance, decree, judgment or other writing evidencing or purporting to evidence any title on its part in or to said lands, and that the defendant has never, at any time, instituted any suit or legal proceeding of any nature before any court, officer or tribunal for the purpose of having an escheat of said lands adjudicated or declared, nor has any public authority or officer ever begun or instituted any such suit or legal proceeding. The complaint next avers that upon the entry of the decree in the Probate Court the property in controversy was marked on the assessment rolls of the county as county property and as exempt from taxation, and has ever since been so treated, except certain portions thereof which the defendant has assumed to convey to private parties by deed; that in the year 1885 the County of King, in the then Territory of Washington, took possession of a certain portion of the tract, which said portion remained in its possession after the organization of the State of Washington and is generally known as the "King County Farm," which is specifically described in the complaint; that the last-described tract has never been used for any county purpose, but has been leased to tenants for the purpose of producing a revenue for the county; that about the year 1900 the defendant took possession of another portion, known as the "King County Hospital Grounds," which is specifically described in the complaint; that the defendant has placed upon the last-described tract valuable improvements in the shape of a hospital building and its appurtenances, the value of which are to the plaintiff unknown, and since thus taking possession the county has used and is now using the same for county hospital purposes; that in the year 1892 the defendant assumed to make a plat of a certan portion of the tract called the "King County Addition to the City of Seattle," and caused the plat thereof to be recorded in the office of the Auditor of King County as required by law; that the defendant has assumed to sell and convey to private parties all of the lots and lands composing this addition, except certain portions which are specifically described in the complaint; that in the year 1903 the defendant assumed to make a further plat of a certain portion of the tract called "King County 2nd Addition to the City of Seattle," and caused the plat thereof to be recorded in the office of the Auditor of King County, as required by law; that the defendant has assumed to sell and convey to private parties all of the lots and lands composing this addition, except certain portions which are particularly described in the complaint;

that the tracts of land described as the "King County Farm,"
16 "King County Hospital Grounds," "King County Addition to the City of Seattle," and "King County 2nd Addition to the City of Seattle," comprise the whole tract acquired by Grotnes or Thompson, except certain portions which have been appropriated for public purposes. The complaint further avers that the plaintiff herein is a son of the sister of Lars Torgerson Grotnes and one of his heirs at law, and that all the now living heirs at law of Grotnes have, by proper mesne conveyances, conveyed their right, title and interest in and to the lands described in the complaint to this plaintiff, who is now the sole owner in fee thereof. It is further averred that the heirs at law of Grotnes had no knowledge of what had become of him; did not learn of his death or the place in which he died, or of the fictitious name which he had assumed until within three years last past, and that since learning thereof such heirs, and particularly the plaintiff, have been diligently engaged in searching for and procuring the proper proofs of the identity of Lars Torgerson Grotnes and John Thompson and his relationship to them.

To this complaint the defendant has interposed a demurrer on the grounds, among others, that the complaint does not state facts sufficient to constitute a cause of action, and that the action has not been commenced within the time limited by law:

At the time of the death of Grotnes, or Thompson, the Probate Practice Act of January 16, 1863, (Laws of '63, p. 198), entitled, "An Act defining the jurisdiction and practice in the Probate Courts of Washington Territory," was in force. Chapter XVI of that act provides for the partition and distribution of estates; chapter XVII for the descent of real property, and chapter XVIII for the distribution of personal property. Section 317 of the act provides that:

"Upon the settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or any heir, devisee or legatee, the Court shall proceed to distribute the residue of the estate, if any, among the persons who are by law entitled."

Section 318 provides that:

"In the decree the Court shall name the person and the
17 portion, or parts, to which each shall be entitled; and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same in possession."

Section 319 provides that:

"The decree may be made on the application of the executor or administrator, or of any person interested in the estate, and shall only be made after notice has been given in the manner required in regard to an application for the sale of land by an executor or administrator. The Court may order such further notice to be given as it may deem proper."

Section 340 provides:

"When any person shall die seized of any lands, tenements, or hereditaments, or any right thereto, or any title to any interest

therein, in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, as follows:"

The first seven subdivisions prescribe the rule or order of descent among the different degrees of kindred, and the eighth subdivision declares:

"If the intestate shall leave no kindred, his estate shall escheat to the county in which such estate may be situate."

Section 353 provides for the distribution of the personal estate, and the seventh subdivision reads as follows:

"If there be no husband, widow, or kindred of the intestate, the said personal estate shall escheat to the county in which the administration is had, and a receipt by the county treasurer of the county to whom such personal property shall be conveyed by the administrator, shall be a full discharge of all responsibility to the said administrator."

The defendant contends, first, that the decree of distribution or escheat, made after due notice, pursuant to this statute, is binding upon the plaintiff and upon all the world; and, second, that in any event, it appears from the face of the complaint that the action is barred by the statute of limitations and by laches. The plaintiff, on the other hand, contends first, that property in a territory which escheats for want of heirs goes to the United States and not
18 to the territory or any county therein; second, that the act violates section eighteen hundred and fifty-one of the Revised Statutes, which declares that, "The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and Laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no taxes shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents"; third, that the act violates section nineteen hundred and twenty-four of the Revised Statutes, which contains the following provision:

"To avoid improper influences, which may result from intermixing in the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

And, lastly, that an escheat can only be enforced by a common law proceeding in the nature of an inquest of office, and that the Territorial Probate Court had no common law jurisdiction.

I will first consider briefly the several objections urged against the validity of the territorial statute by the plaintiff. The first objection is, in my opinion, without merit. As already stated, the legislative power of the territory extended to all rightful subjects of legislation, and a statute providing for the descent and distribution of property in cases of intestacy would certainly seem to fall within that category. The act was never disapproved by Congress (Section 1850 U. S. R. S.); its validity has been recognized by both State and Federal Courts (Territory v. Klee, 1 Wash., 183; Pacific Bank v. Hanna, 90 Fed. 72), and, in the language of the Court in Crane v. Reeder, 21 Mich., 24:

"Congress never legislated on the subject, and there never has been

an instance of an escheat claimed to have accrued to the United States since they came into existence."

Again the Court said:

"We have no tenures which would stand between the government and the estate, and it becomes, therefore, a very narrow inquiry where the escheat shall go."

19 "It would seem to be an obvious answer, that it must go where the law directs. Tenures and their incidents, the rules of inheritance, are all the creatures of the law, and except as to rights already vested, may be changed and modified at pleasure. And it was for the law-making power, that could control lands and thir enjoyment in Michigan, to direct where lands should go for default of heirs, as it was to direct who should be regarded as heirs at all. For there is no such thing as a natural line of inheritance independent of the law. * * *"

"If Congress had seen fit to provide for such cases, we think it had power to do so. We are not prepared to question its authority on any theoretical grounds arising out of the conditions of cession, although those conditions are significant in construing the ordinance. This region was acquired by treaty, and did not come into the actual possession of the United States until after the Constitution was adopted, and it was held in United States v. Repentigny that the United States succeeded directly to the rights of the French and British Governments, which had complete supremacy. But the articles of confederation made no provision for the direct legislation of Congress over the local affairs of any part of the country, and such direct government, while possibly it might have been lawful, would have been at variance with the whole theory of local government, which had been acted upon both by states and colonies. The delegation of legislative powers to the territories was practically a necessity, and the ordinance of 1787, while retaining a right of veto or disapproval of the acts of the governor and judges, provided expressly that such laws as are not disapproved shall only be repealed by local authority. No one can read the ordinance without perceiving that it was intended to throw the whole regulation of local affairs upon the local government. The public lands were not to be interfered with till they had been severed from public domain by primary disposal. But when they had become private property, they came, like all private rights, under local regulation."

"Immediately after the Government of the United States was organized under the Constitution, a brief statute was passed to adapt the ordinance to the Constitution; not to change its nature,

20 but, as stated in the preamble, in order that it 'may continue to have full effect.'"

"And so long as the system should continue, the whole local regulation was clearly delegated to the territory, as it was afterwards to Michigan when separately organized."

"Even under the old common law notions the creation of such a government would be at least an equivalent to the erection of a county Palatine, and would transfer all necessary sovereign prerogatives. But under this ordinance the territory only differed from a

state in holding derivative instead of independent functions, and in being subject to such changes as Congress might adopt. But, until revoked or annulled, the act of the territory was just as obligatory as the act of Congress, and for the same reason."

The statute does not interfere with the primary disposal of the soil; that term is used in reference to the public lands of the United States and means their disposal by the officers or agents of the government to some person who, having the qualifications to acquire such lands, and having complied with the terms of the law, is entitled to a conveyance by patent or deed without any reserved authority in the government or its officers to withhold the same.

Topeka Commercial Security Co. v. McPherson, 7 Okla., 332.

Mormon Church v. United States, 136 U. S. 1, Territory v. Lee, 2 Mont. 124, and Williams v. Wilson, 1 Martin & Yerger, (1 Tenn., p. 247), cited by the plaintiff, are not in point. In the Mormon Church case the act of Congress explicitly declared that the property should be forfeited to the United States. In the Montana case the territorial legislature attempted to forfeit to the territory possessory rights in mining claims held by aliens, while the title to the property was vested in the general government. In the Tennessee case it does not appear that there was any territorial legislation on the subject, or that there was any territorial government to which the property could escheat.

The next contention is, that the provisions of the Probate Practice Act of 1863 relating to wills and to the descent and distri-
21 bution of property are not within the title of the act and therefore void. Mere lapse of time and a proper regard for the stability of titles forbid an inquiry into this question at this late day. All our probate laws have been enacted under similar titles, their validity has been recognized by the courts, and acquiesced in by the people, for upwards of half a century, and to overthrow them now would unsettle half the titles in the state. Furthermore, if the question were a new one the objection is not tenable. It is conceded that the provision relating to the distribution of estates is within the title, and, if so, it is but a short step to provide to whom distribution shall be made; otherwise the provision for distribution itself would be wholly inoperative.

It is lastly contended that the Probate Court had no jurisdiction to determine the rights of those claiming adversely to the estate and that it had no jurisdiction to declare or decree an escheat. The first proposition will be acceded to if claims adverse to the intestate are meant, but if it means the conflicting claims of those claiming under the intestate the proposition is wholly without merit, for such power is exercised by Probate Courts every day; in fact that is the principal office of a hearing on the application for a decree of distribution. Whether the Probate Court had jurisdiction to declare or decree an escheat depends entirely upon the construction of the local laws of the territory. It will be conceded that the usual form of proceeding for this purpose at common law was by an inquisition or inquest of office before a jury, but whether this or some other form of proceeding shall be resorted to depends wholly upon the legislative

will. As said by the Court in Hamilton v. Brown, 161 U. S. 256, 263:

"In this country, when title to land fails for want of heirs and devisees, it escheats to the state as part of its common ownership, either by mere operation of law, or upon an inquest of office, according to the law of the particular state."

There is nothing sacred about this or any other rule of the common law; for, as said by the Court in Munn v. Illinois, 94 U. S. 113, 134:

"A person has no property, no vested interest, in any rule
22 of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to changes of time and circumstances."

It was therefore entirely competent for the legislature to provide that the territory or one of its counties should be the ultimate heir of those dying intestate and without other heirs or kindred; and it was further competent for it to provide that the rights of the territory or the county should be determined by the Probate Court in the administration proceeding in the same manner and by the same procedure as the rights of any other claimant to the estate.

It is conceded that under section 340 of the Probate Act relating to the descent of real property, it would have been entirely competent for the Court to determine that there were no children or lineal descendants of the intestate under subdivision one, and to distribute the property to the father under subdivision two. It would likewise have been competent for that Court to determine that there was no father or lineal descendants under subdivisions one and two and to distribute it to the brothers and sisters under subdivision three. Its determination upon these questions after due notice and hearing, on well established principles, would be binding upon the whole world.

McGee v. Big Bend Land Co., 51 Wash. 406.
In re Ostlund's Estate, 57 Wash., 359.
Case of Broderick's Will, 21 Wall., 503.
Proctor v. Dicklow, 45 Pac. 86.

Why was it not equally competent for the Probate Court to determine that there were no kindred and to escheat the property to the county? In my opinion such was the legislative intent, and this view of the subject is strengthened by reference to sublivision
23 seven of section 353, relating to the distribution of personal property. It is there provided that if there be no husband, widow or kindred of the intestate, the personal estate shall escheat to the county and the administrator shall convey it to the county treasurer. The provision is not that the administrator shall convey it to the county treasurer, if not claimed by husband, widow or kindred, but that he shall convey it if there are none such, and the Probate

Court was necessarily invested with jurisdiction to determine that question. This view is further strengthened by the fact that the provision of section 480 of the Civil Practice Act of 1854 (Laws '54, p. 218), authorizing the prosecuting attorney to file an information in the District Court for the recovery of property escheated or forfeited to the territory, was eliminated by the Civil Practice Act of 1863 (Laws '63, p. 192), and since 1863 there was no provision in the laws of either the territory or state, in relation to escheats, except those found in the Probate Practice Act, until the passage of the Act of 1907.

1 Rem. & Ball. Code, Sec. 1356, et seq.

The latter act left the subject of escheats to be dealt with by the Court administering the estate as before, limiting only the time within which heirs must appear to claim the estate. The Probate Courts of the territory and the Superior Courts of the state have uniformly assumed jurisdiction in this class of cases, and the right of the state or county to appear in the probate proceeding and contest the rights of other claimants has been recognized by the highest court of the state.

In re Sullivan's Estate, 48 Wash., 631.

For these reasons I am of opinion that a valid title was vested in the county by the decree of the Probate Court and that the complaint states no cause of action. This view of the case renders it unnecessary to consider the question of adverse possession. If the complaint contains a defense on that ground it will at once be conceded that the pleading is very inartificially drawn with that object in view, but nevertheless it is difficult to escape the conclusion that the county has held the property adversely under color of title and claim of right far beyond the statutory period.

I have not overlooked the fact that the complaint avers that
24 Grotnes changed his name, but I assume that this allegation was inserted for the purpose of avoiding a charge of laches against the heirs. In any event, it is well established that a man may lawfully change his name, without resorting to legal proceedings, and for all purposes the name thus assumed by him will constitute his legal name, just as much as if he had borne it from birth; and legal proceedings instituted against him, under the assumed name will bind him and those claiming under him.

29 Cyc. 271.

The demurrer is sustained.

Indorsed: Opinion. Filed in the U. S. District Court, Western District of Washington, May 8, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States District Court of the Western District of Washington, Northern Division.

No. 1969.

THOMAS CHRISTIENSON, Plaintiff,
vs.
THE COUNTY OF KING, Defendant.

Order Sustaining Demurrer.

This cause having come on for hearing before the Court on the amended demurrer of defendant to plaintiff's complaint, and the Court having heard the arguments of counsel for and on behalf of the respective parties on the 6th day of April, 1912, and having taken said cause under advisement, written briefs being presented and filed with the Court, and the Court having heretofore announced its decision sustaining said demurrer:

Now, therefore, in consideration of the premises, it is here and now ordered, adjudged and decreed that the amended demurrer of defendant to plaintiff's complaint, be and the same is here and now sustained. To which order of the Court the plaintiff prayed an exception, which exception was by the Court allowed.

Dated this 16th day of May, 1912.

FRANK H. RUDKIN, *Judge.*

O. K. as to form.
EDWARD JUDD,
Attorney for Plaintiff.

Indorsed: Order Sustaining Demurrer. Filed in the U. S. District Court, Western Dist. of Washington, May 16, 1912. A. W. Engle, Clerk, by S., Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 1969.

THOMAS CHRISTIANSON, Plaintiff,
vs.
THE COUNTY OF KING, Defendant.

Order Allowing Amendment of Complaint.

And now on this day this cause having come on to be heard upon the motion of the plaintiff for leave to amend his complaint in this action;

It is hereby ordered by the Court, that the plaintiff be and he hereby is granted leave to file an amended complaint in this action.

and it is hereby ordered that the amended demurrer of the defendant to the original complaint in this action stand to the amended complaint in this action.

Done in open Court this 25th day of May, 1912.

FRANK H. RUDKIN, *Judge.*

O. K.
J. F. M.
R. H. E.

Indorsed: Order Allowing Amendment of Complaint. Filed in the U. S. District Court, Western Dist. of Washington, May 25, 1912. A. W. Engle, Clerk, by S., Deputy.

26 In the United States District Court for the Western District of Washington, Northern Division.

No. 1969.

THOMAS CHRISTIANSON, Plaintiff,
vs.
THE COUNTY OF KING, Defendant.

Amended Complaint.

And now comes the plaintiff, and by leave of Court first had and obtained, files his amended complaint in the words and figures following, to-wit:

I.

That the plaintiff is a subject of the King of Norway.

II.

That the defendant is a municipal corporation, organized under the laws of the State of Washington, and is a citizen of the State of Washington.

III.

That the controversy in this action involves a subject of a foreign government and a citizen of the State of Washington, and of the United States of America. That the matter in dispute and controversy in this action, exclusive of interest and costs, exceeds in value the sum of Three Hundred Thousand Dollars ($300,000.00).

That the controversy in this action involves the construction of that portion of Amendment V to the Constitution of the United States which provides that private property shall not be taken for public use without just compensation.

That the controversy in this action involves the construtcion of those parts of Amendment V and XIV to the Constitution of the United States which provide that no person shall be deprived of property without due process of law.

That the controversy in this action involves the construction of the

act of the United States Congress which established the Courts
27 of the Territory of Washington, creating among other judicial tribunals, the Probate Courts of said Territory, being Section 1907 of the Revised Statutes of the United States of 1874.

That the controversy in this action involves the construction of the act of the United States Congress vesting the legislative power of the Territory of Washington, and providing that no law shall be passed by the Territorial legislature interfering with the primary disposal of the soil, being Section 1851 of the Revised Statutes of the United States of 1874.

That the controversy in this action involves the construction of the act of the United States Congress restricting legislative power of the Territory of Washington, and providing among other things, that every law shall embrace but one object, and that shall be expressed in the title, being Section 1924 of the Revised Statutes of the United States of America of 1874.

IV.

That during the month of March, 1865, one Lars Torgerson Grotnes, departed this life in the County of King, in the Territory of Washington, intestate, and being at the time of his death a resident of the County of King. That at the time of his death, said Lars Torgerson Grotnes was commonly known in the neighborhood where he resided by the name of John Thompson.

V.

That prior to his death, said Lars Torgerson Grotnes had become the owner in fee of a certain tract or parcel of land, the title to which was conveyed to him under the name of John Thompson, which tract or parcel of land is located in the County of King and State of Washington, and more particularly described as follows, to-wit:

Beginning at a post on the right bank of Duwamish River, the same being the southeast corner of the Original Donation Land Claim of Luther M. Collins, in Township 24 North of Range 4 East, in Section 29; running thence east along the south boundary of said claim, and the north boundary of J. Bush's claim 14 chains and 3 links; thence north 13 deg. 04′ east, 124 chains to the north
28 line of said claim, so as not to enclose any of the improvements upon the east half of that portion of said claim deeded by said L. M. Collins to Joseph Williamson and William Greenfield; thence west along the north line of said claim, 20 chains and 67 links to a post, the same being the northwest corner of said claim; thence south along the west boundary of said claim, 82 chains to a post on the right bank of the Duwamish River, being the southeast corner of Eli B. Maple's land claim; thence along the meanderings of said river to the southwest corner of said land claim, the place of beginning, so as to contain 160 acres.

That said Lars Torgerson Grotnes, under the name of John Thompson, acquired title to said land by a deed conveying the same in fee to him by Joseph Williamson and William Greenfield,

which deed was duly recorded in the office of the Recorder of Conveyances of the County of King in the Territory of Washington, in Vol. 1 of Deeds on page 14.

That said Joseph Williamson and William Greenfield acquired title to said land by a deed conveying the same in fee to them from Luther M. Collins, which deed was duly recorded in the office of the Recorder of Conveyances of the County of King in the Territory of Washington, in Vol. "A" of Deeds, on page 516.

That said Luther M. Collins acquired title to said land by a patent conveying to him the same in fee from the United States of America, which patent was duly recorded in the office of the Recorder of Conveyances of the County of King in the Territory of Washington, in Vol. 13 of Deeds, on page 699.

VI.

That said Lars Torgerson Grotnes died a bachelor, leaving him surviving as his heirs at law, two brothers, one sister, and the children of a deceased sister, all of whom were subjects of the King of Norway. That the plaintiff is a son of a sister of said Lars Torgerson Grotnes, and one of his heirs at law. That all the other now living heirs at law of said Lars Torgerson Grotnes have by proper mesne conveyances, conveyed their right, title and interest in and to said land above described to the plaintiff. That the plaintiff is now the sole owner in fee of said land.

29 VII.

That said Lars Torgerson Grotnes was born on or about the 30th day of August, 1829, in the City of Porsgrund, in the Kingdom of Norway. That the name of his father was Torger Engebretson Grotnes, and the name of his mother, was Catherine Grotnes. That at the age of about 21 years, he shipped as a sailor from said city of Porsgrund and went by way of England to Australia, and thence in the year 1856, to the city of San Francisco, California. That while in the harbor of said last named city, he fled from the sailing vessel on which he was a sailor because of abuse and ill treatment. That he changed his name from Lars Torgerson Grotnes, to John Thompson in order to conceal his identity, so that he could not be apprehended and brought back to the vessel from which he had fled. That he came to the neighborhood of Elliott Bay in said King County, and resided in the neighborhood of the same in King County and Kitsap County, in said Territory of Washington, until the time of his death in 1865. That he acquired the land above described under the name of John Thompson.

VIII.

That the heirs at law of Lars Torgerson Grotnes had no knowledge of what had become of him, and did not learn about his death and the place in which he died, nor of the fictitious name which he had assumed, until within three years last past. That since learning thereof, such heirs, and particularly the plaintiff, have been dili-

gently engaged in searching for and procuring the proper proofs of the identity of Lars Torgerson Grotnes and John Thompson, and his relationship to them.

IX.

That on the 26th day of March, 1865, the Probate Court of the County of King in the Territory of Washington, assumed to appoint one Daniel Bagley, administrator of the estate of John Thompson, deceased.

That there was presented to said Probate Court a document in the words and figures following to-wit:

30 "Petition to the Honorable Probate Court:

I would most respectfully ask to have Mr. Daniel Bagley appointed administrator of the estate of John Thompson, deceased.

H. L. YESLER.
J. WILLIAMSON.

Dated March 11, 1865."

That the said document last above described was the only document presented to said Probate Court purporting to be a petition for the appointment of an administrator of the estate of John Thompson, deceased.

That on the 26th day of March, 1865, said Probate Court as above stated, assumed to appoint Daniel Bagley administrator of the estate of John Thompson, deceased, and the only order thus appointing said Bagley was in the words and figures following, to-wit.

"Whereas, John Thompson, of the county aforesaid, on the — day of March, 1865, died intestate, leaving at the time of his death property subject to administration,

Now, therefore, know all men by these presents that I do therefore appoint Daniel Bagley administrator upon said estate, and authorize him to administer the same according to law.

THOMAS MERCER,
Probate Judge.

Dated March 26, 1865."

That on May 26, 1868, there was presented to said Probate Court a petition in the words and figures following, to-wit:

"In the Matter of the Estate of JOHN THOMPSON, Deceased; DANIEL BAGLEY, Administrator.

Alexander Gow and James W. Bush being duly sworn upon their oaths depose and say that they are County Commissioners of King County in Washington Territory, that as affiants are informed and believe there is a large sum of money remaining in the hands of said Daniel Bagley, as administrator of said estate, that no heirs have ever appeared to claim the balance in said administrator's

hands, that as affiants verily believe no heirs of said Thomp-
31 son are known to exist; that King County is entitled to the balance remaining in said administrator's hands.

Wherefore said affiants pray your honor to make an order requiring said Bagley to render an account of the balance in his hands of said estate and requiring him to forthwith pay the same to the treasurer of said King County, as required by law.

To the Probate Court of King County in Washington Territory.

ALEX. GOW.
JAMES W. BUSH.

Subscribed and sworn to before me this 6th day of May, 1868. Witness my hand and official seal.

[SEAL.] IKE M. HALL,
Auditor said King County.

Filed May 26, 1868. T. Mercer, Probate Judge."

That based upon the petition last described, there was issued by the said Probate Court a certain citation against Daniel Bagley, administrator of the estate of John Thompson, deceased, which was served upon him by the sheriff of said county of King in the Territory of Washington, which citation and return thereon were in the words and figures following, to-wit:

"TERRITORY OF WASHINGTON,
County of King, ss:

In the Probate Court of said King County.

In the Matter of the Estate of JOHN THOMPSON, Deceased.

To the Sheriff of said King County, Greeting:

Whereas the County Commissioners of said King County have filed in the said Probate Court their application under oath asking an order of said court requiring Daniel Bagley to render his final account as administrator of the estate of said John Thompson, deceased, and to pay over to King County the residue of said estate remaining in his hands as such administrator.

Now, therefore, in the name of the United States of America, you are hereby commanded to cite said Daniel Bagley to be
32 and appear in said Probate Court on the first day of the next term thereof then and there to show cause why such orders shall not be made and an attachment issue against him to compel obedience thereto.

In testimony whereof, I, the undersigned Probate Judge in and for said King County, have hereunto set my hand and affixed my official seal this 26th day of May, 1868.

[SEAL.] T. MERCER,
Probate Judge.

This citation came into my hands May 26th, 1868. Served the same by delivering a true copy to said Daniel Bagley, May 27th, 1868.

L. V. WYCKOFF, *Sheriff*,
By L. S. SMITH, *Deputy*.

Services.....	$1.00
Copying 200 words..	.40
	1.40

That on July 27, 1868, there was presented to said Probate Court a report of Daniel Bagley, administrator of the estate of John Thompson, deceased, which was in the words and figures following, to-wit:

"July 27th, 1868.

To the Hon. Probate Court of King Co., W. T. holding terms at Seattle, W. T.:

In answer to your citation in the case of John Thompson, deceased, under date of May 26th, 1868, I have to say, that only a few weeks before that I was called upon by Mr. Wold in behalf as he signified of the countrymen of John Thompson and earnestly requested to keep the matter in my hands till he could ascertain the whereabouts of the heirs, as they were well assured that heirs were living in Sweden.

I ask at least till another term of your court to see result of said action and if no word be had of heirs, then that I turn over to the County of King, the property and effects in my hand, so as to make final report to you at the next state- term of your court.

DANIEL BAGLEY, *Adm'r.*"

33 That on the 29th day of October, 1868, there was presented to said Probate Court an affidavit in the words and figures following, to-wit:

"TERRITORY OF WASHINGTON,
County of King, ss:

In the Probate Court of King Co., W. T.

In the Matter of the Estate of JOHN THOMPSON, D'c.

John J. McGilvra on oath says that he is a citizen of King County, W. T., that he has been applied to by the Board of County Commissioners of King County to pursue the proper action of the above named court to compel Dan'l Bagley, administrator of said estate, to settle with the Court and place said estate in such a position that said county, to whom said estate by law escheats, may have the full benefit thereof. That no definite agreement as to such employment was made, yet affiant believes that a majority, if not all, of the said Board of County Commissioners desire affiant to proceed as the at-

torney of the county in the premises; affiant further says that it had escaped his memory that this was the time for a regular term of said court or he would have been present and resisted the entry up of said order, now moved to be vacated or any such order in the premises.

Subscribed and sworn to before me this 28th day of October, A. D. 1868.

JOHN J. McGILVRA.

Filed Oct. 29, 1868."

That on February 10, 1869, there was presented to said Probate Court a petition for disposition of the estate of John Thompson, deceased, which was in the words and figures following, to-wit:

34 "TERRITORY OF WASHINGTON,
County of King, ss:

In the Probate Court of King County, Aforesaid.

In the Matter of the Estate of JOHN THOMPSON, D'c's.

And now comes the County of King, by their attorney, John J. McGilvra, and moves the Court to revoke the letters of administration issued to Daniel Bagley on or about the 26th day of March, A. D. 1865, for the following reasons:

1st. Because he has been guilty of negligence in failing to make an exhibit as required by S. 285, p. 251, Laws of W. T. of 1863.

2nd. Because he has been guilty of negligence in failing to render his annual accounts (none ever having been rendered) as required by S. 287, p. 251, Laws of W. T., of 1863.

3rd. Because he has proceeded to sell real estate without obtaining a proper order upon petition and notice, as required by Sections 217 and 218, 219, p. 239, Laws of W. T., of 1863.

4th. Because no notice of such sale was given as required by S. 228 and *c*P. of Laws of 1863.

5th. Because no return of such sale was made as required by Sec. 222, P. 241, aforesaid.

6th. Because he has procured no order of confirmation as required by Sec. 234, P. 242, Laws of W. T., of 1863, but has proceeded to deed without such confirmation.

7th. Because the said administrator has been guilty of gross negligence and mismanagement generally in connection with the said estate.

JOHN J. McGILVRA,
Attorney for King Co.

Filed Feb. 10th, 1869."

That on February 12, 1869, there was presented to said Probate Court a petition for disposition of the estate of John Thompson, deseased, which was in the words and figures following, to-wit:

35 "In the Probate Court of King County and Washington Territory.

In the Matter of the Estate of JOHN THOMPSON, Deceased.

Petition for Disposition of the Estate.

To the Hon. Probate Court of King County, W. T.:

The petition of Daniel Bagley, admr. of the estate of John Thompson, deceased, respectfully shows:

That the final account of your petitioner as such admr. has been filed, and after due hearing and examination was finally settled.

That all the debts of said deceased, and of the estate, and all the expense of the administration thus far incurred, and the taxes that have attached to, or accrued against the said estate have been paid and discharged, and the said estate is now in a condition to be closed.

That the residue of the said estate now remaining in the hands of your petitioner is fully set forth and described in the schedule marked A hereunto annexed and made a part of this petition. That no heirs at law of the said John Thompson have been found after diligent search and effort.

Therefore your petitioner prays that the administration of said estate may be brought to a close, and that he may be discharged from his trust as such administrator. That after due notice given any proceedings had the estate remaining in his hands, as petitioner aforesaid, may be turned over to King County, Washington Territory; or such other or further order made as may be meet in the premises.

And your petitioner will ever pray.

Dated February 12th, A. D. 1869.

DANIEL BAGLEY, *Adm'r.*"

That in pursuance of the petition last described, there was published a notice of the hearing of said petition, the affidavit of the publication of which notice and said notice filed in said Court were in the words and figures following, to-wit:

36 "TERRITORY OF WASHINGTON,
County of King, ss:

S. L. Maxwell, on oath says that he is the publisher of a weekly newspaper published in Seattle, King Co., W. T., and that the notice, of which a copy is hereto attached, was published therein for four successive weeks from the 5th day of April to the 26th day of April, 1869, inclusive.

S. L. MAXWELL.

Subscribed and sworn to before me this 26th day of May, A. D. 1869.

DANIEL BAGLEY,
Notary Public, Seattle, W. T."

"In the Probate Court of King County, W. T.

In the Matter of the Estate of JOHN THOMPSON, Deceased.

Order to Show Cause Why Decree of Distribution Should Not Be Made.

On reading and filing the petition of Daniel Bagley, administrator of the estate of John Thompson, deceased, setting forth that he had filed his final account of his administration of the estate of said deceased in this Court, and that the same has been duly settled and allowed, that all the debts and expenses of the said administration have been duly paid, and that a portion of said estate remains to be divided among the heirs of said deceased, and praying among other things for an order of distribution of the residue of said estate among the persons entitled;

It is ordered: That all persons interested in the estate of the said John Thompson, deceased, be and appear before the Probate Court of the County of King, and Territory of Washington, at the court room of said Court, in the Town of Seattle, in said County, on Monday, the 26th day of April, A. D. 1869, at 10 o'clock a. m., then and there to show cause why an order of distribution should
37 not be made of the residue of said estate among the heirs of said deceased according to law.

It is further ordered that a copy of this order be published for four successive weeks before the said 26th day of April, A. D. 1869, in the Seattle Intelligencer, a newspaper printed and published in the said County of King.

Dated March 29th, 1869.

THOMAS MERCER,
Clerk and Probate Judge."

That such proceedings were had in said estate in said Probate Court, that on the 26th day of May, 1869, a final decree of distribution was entered in said estate, which decree is in the words and figures following, to-wit:

"In the Probate Court of King County, Washington Territory.

In the Matter of the Estate of JOHN THOMPSON, Deceased.

Decree of Distribution of the Estate.

Daniel Bagley, the Administrator of the Estate of John Thompson, deceased, having on the 12th day of February, A. D. 1869, filed in this Court his petition, setting forth, among other matters, that his accounts have been finally settled and that all the debts of said decedent and of said estate, and the expenses and charges of administration have been paid, that a portion of said estate remains in his

hands, and praying for an order of distribution of the residue of said estate, remaining in his hands as aforesaid:

And this Court having thereupon, to-wit: on the day aforesaid, made an order directing all persons interested in said estate to be and appear before this Court, at the court room thereof, on Monday, the 26th day of April, A. D. 1869, at 10 o'clock a. m., then and there to show cause why an order of distribution should not be made of the residue of said estate according to law, and directing a copy of said order to show cause to be published for four successive weeks before the said 26th day of April, A. D. 1869, in the
38 "Weekly Intelligencer," a newspaper printed and published in the County of King, Washington Territory;

And at said hour on the said 26th day of April, A. D. 1869, upon satisfactory proof of the due publication in said newspaper of said order to show cause for four successive weeks before said 26th day of April, A. D. 1869, as directed by said Court, the hearing of said petition was by order of this Court duly made and entered, continued until this 26th day of May, A. D. 1869, at 10 o'clock a. m., and at the last mentioned hour and time, the said administrator appearing in person,

This Court proceeded to the hearing of said petition, and the inventory and appraisement of said estate, the final account of said administrator, the decree allowing and settling the same, and the decree of due publication of notice to creditors, together with other documentary evidence and record proofs, were offered and put in evidence, and the said administrator, Daniel Bagley, examined in open court.

And it appearing to the satisfaction of this Court, from said documentary and other proofs, and said examination of said administrator

That said Daniel Bagley duly qualified as such administrator on the 26th day of March, A. D. 1865, and thereupon entered upon the administration of said estate, and has ever since continued to administer the same;

That due and legal notice to creditors was published, and that a true inventory and appraisement of said estate were duly made and returned to this Court;

That more than four years have elapsed since the appointment of said Daniel Bagley as such administrator, and more than four years have expired since the first publication of said notice to creditors;

That said administrator has fully accounted for all the estate that has come to his hands, and that the whole estate, so far as it has been discovered, has been fully administered, and the residue thereof, consisting of the property hereinafter particularly described, is now ready for distribution.

That all the debts of said decedent and of said estate, and all the expenses of the administration thereof thus far incurred, and
39 all taxes that have attached to or accrued against the said estate, have been paid and discharged, and said estate is now in condition to be closed;

That said decedent died intestate in the County of King, Wash-

ington Territory, on the — day of March, A. D. 1865, leaving no heirs surviving him;

That since the rendition of his final account, the sum of ($8.00) has been expended by said administrator, the voucher whereof is now presented and filed and said payment is approved by this Court; and the estimated expenses of closing said estate will amount to the sum of $——

There being no heirs of said decedent, that the entire estate escheat to the County of King, in Washington Territory.

Now on this 26th day of May, A. D. 1869, on motion of said Daniel Bagley, administrator of said estate, and no exceptions or objections being filed or made by any person interested in the said estate or otherwise;

It is hereby ordered, adjudged and decreed: that all the acts and proceedings of said administrator, as reported by this Court and as appearing upon the records thereof, be and the same are hereby approved and confirmed; and that after deducting said estimated expenses of closing the administration, the residue of said estate of John Thompson, deceased, not heretofore distributed, hereinafter particularly described, and now remaining in the hands of said administrator, and any other property not now known or discovered which may belong to the said estate, or in which the said estate may have any interest, be and the same is hereby distributed as follows, to-wit: The entire estate to the County of King, in Washington Territory.

And it is further ordered that the said administrator, upon payment and delivery of the said residue as hereinbefore ordered, and upon filing due and proper vouchers and receipts therefor in this Court, be fully and finally discharged from his trust as such administrator, and that his sureties shall thereupon and thenceforth be discharged from all liability for his future acts.

The following is a particular description of the said residue
40 of said estate referred to in this decree, and of which distribution is ordered, adjudged and decreed, to-wit:

1st. Cash, to-wit: $343.83 gold coin.

2nd. And real estate, to-wit: One hundred and sixty acres of land on Duwamish River, in King County, W. T., more particularly described in a certain deed from Joseph Williamson and William Greenfield to John Thompson, dated January 19th, A. D. 1865, and recorded in Volume 1 of the records of King County, W. T., on pages 458, 459 and 460.

Third. A lease of said land to John Martin, dated March 5th, 1866, on which the entire rent reserved remains due and unpaid.

Dated May 26th, 1869.

THOMAS MERCER,
Probate Judge.

Probate Journal.
Volume "A," page 175."

IX.

That said decree was null and void, and said Probate Court was wholly without jurisdiction to in any manner vest, transfer, convey, fix or pass upon the title to the land described in said decree, and had no power or authority to declare said land escheated which is the same land as above described.

That all claims to said land by the defendant, and all acts done by the defendant in reference to said land, and all control exercised or attempted to be exercised by the defendant over said land, have been made, done, performed and exercised, under and by virtue of said null and void decree above described.

That the defendant has not, and never has had any contract, deed, conveyance, decree, judgment, nor other writing, record or document evidencing, or purporting to evidence any title on its part in or to said land.

That the defendant has never at any time begun or instituted any suit or legal proceeding of any nature before any court, officer or tribunal, for the purpose of having an escheat of said land adjudicated, adjudged or declared; nor has any other au-
41 thority or officer ever begun or instituted any such suit or legal proceeding.

That the defendant has never at any time begun or instituted any suit or legal proceeding of any nature before any court, officer or tribunal, for the purpose of having any title, or claim of title, which it had or might have in said land established, approved, confirmed or quieted; nor has any other public authority or officer ever begun or instituted any such suit or legal proceeding.

X.

That after the entry of said decree, the land above described was marked upon the assessor's roll as county property and as exempt from taxation, and has ever since been so treated, except certain portions thereof hereinafter described, which the defendant has assumed to convey to private parties by deed.

That about the year 1885, the County of King, in the then Territory of Washington, occupied a certain portion of the tract of land above described, which said portion remained in its occupancy and after the organization of the State of Washington, has remained in the control of the defendant, and is generally known as the "King County Farm," and is more specifically described as follows:

Beginning at a post on the right bank of the Duwamish River, the same being the southwest corner of the original donation land claim of Luther M. Collins, in Township 24 North, Range 4 East, in Section 29; running thence east along the south boundary of said claim, and the north boundary of J. Bush's claim 14 chains and 3 links; thence north 13 degrees and 4′ east, to the east bank of the Duwamish River; thence in a southwesterly direction along the meanderings of said river to the place of beginning.

That the same has never been used for any county purposes, but

has been let out to tenants for the purpose of being farmed and producing a monetary income for the county.

That about the year 1900, the defendant occupied a portion of the tract of land first above described, which portion is known as the "King County Hospital Grounds," and is more specifically described as follows:

42 Beginning at the southeast corner of block 6 in King County Addition to the City or Seattle, thence along the southwest side of said block 6 to the southwest corner of said block 6; thence south to the east bank of the Duwamish river; thence in a southerly direction along the east bank of said Duwamish River to the point of its intersection with the west line of Charleston Avenue; thence in a northeasterly direction along the west side of Charleston Avenue to the place of beginning.

That the defendant has placed upon the last described tract of land valuable improvements in the shape of a hospital building and its appurtenances, the exact value of which are to the plaintiff unknown, and since thus occupying the last described tract, has been and now is using the same for county hospital purposes.

That in the year 1892, the defendant assumed to make a plat of a certain portion of the tract of land first above described, and caused the same to be called the "King County Addition to the City of Seattle," and caused the same to be recorded in the office of the Auditor of King County in Volume VIII of Plats on page 59.

That the defendant has assumed to sell and convey to private parties all of the land composing said last named King County Addition, except such portion as is described as follows:

"Lots 1, 2, 3, 4, 8 and 9 in Block 5; Lots 5, 6, 7, 8, 9, in Block 7, which said Lots always have been and now are vacant and unoccupied and Lots 20 and 21 in Block 7, which last two lots were unoccupied and vacant until within less than ten years last past, but within the time last mentioned have been leased by the defendant to other parties to produce a monetary income.

That in the year 1903, the defendant had assumed to make a plat of a certain portion of the tract of land first above described and caused the same to be called "King County 2nd Addition to the City of Seattle," and caused the same to be recorded in the office of the Auditor of said King County, in Volume XI of Plats, on page 1. That the defendant has assumed to sell and convey to private parties all of the land composing said last named King County 2nd Addition, except such portion as is described as follows:

43 Lots 1 to 9 both inclusive; Lots 13 to 16 both inclusive, and Lots 20 to 27 both inclusive, in Block 1; all of Blocks 2, 3 and 4; Lots 1 to 4 both inclusive; 8, 9, 12 to 16 both inclusive, and 21 to 25 both inclusive, all in Block 5; Lots 1 to 14 both inclusive, and 20 to 23 both inclusive in Block 6; Lots 2, 6 to 9 both inclusive, and 18 to 20 both inclusive, all in Block 7; Lot 1 in Block 8; and Lots 2 to 5 both inclusive in Block 12, which said Lots always have been and now are vacant and unoccupied, and Lots 10 to 12 both inclusive, and 17 to 19 both inclusive, all in Block 1, which 6 last described lots were unoccupied and vacant until within less

than ten years last past, but within the time last mentioned have been leased by the defendant to other parties to produce a monetary income.

XI.

That the tracts of land hereinbefore described as the "King County Farm;" "King County Hospital Grounds;" "King County Addition to the City of Seattle" and "King County 2nd Addition to the City of Seattle," together comprise the whole of the tract herein first above described as being the property belonging to Lars Torgerson Grotnes, except certain portions thereof which have been appropriated for public or quasi public purposes for railroad rights of way or highways.

XII.

That the plaintiff is entitled to recover from the defendant all of the buildings and improvements and tangible betterments which the defendant placed upon or attached to said land prior to the year 1903, but the plaintiff hereby expressly disclaims all right to any such buildings, improvements or tangible betterments, and hereby admits and consents that the defendant may retain the same, or be reimbursed for the same out of the said land at the present value of said buildings, improvements and tangible betterments.

* * * * * * *

Wherefore, the plaintiff prays that he may recover possession from the defendant of the land hereinbefore described as the "King County Farm;" the land hereinbefore described as the "King County Hospital Grounds;" the land hereinbefore stated not to have
44 been assumed to be sold and conveyed by the defendant to private parties, which is located in said "King County Addition to the City of Seattle," and the land hereinbefore stated not to have been assumed to be sold and conveyed by the defendant to private parties, which is located in said "King County 2nd Addition to the City of Seattle;" and that the plaintiff may recover of the defendant the costs of this action.

EDWARD JUDD,
S. S. LANGLAND AND
W. A. KEENE,
Attorneys for Plaintiff.

P. O. Address: 620-621 New York Block, Seattle, Washington.

STATE OF WASHINGTON,
County of King, ss:

Thomas Christianson being first duly sworn on oath deposes and says, that he is the plaintiff in the above entitled action; that he has heard read the foregoing amended complaint, and knows the contents thereof, and verily believes the same to be true.

THOMAS CHRISTIANSON.

Subscribed and sworn to before me this 18th day of May, A. D. 1912.

ANNA RASDALE,
Notary Public in and for the State of Washington, Residing at Seattle.

Copy of within Amended Complaint received and service of the same acknowledged this 21st day of May, 1912.

JOHN F. MURPHY AND
ROBERT H. EVANS,
Attorneys for Defendant.

Indorsed: Amended Complaint. Filed in the U. S. District Court, Western Dist. of Washington, May 27, 1912. A. W. Engle, Clerk. By S., Deputy.

45 In the United States District Court for the Western District of Washington, Northern Division.

No. 1969.

THOMAS CHRISTENSON, Plaintiff,
vs.
THE COUNTY OF KING, Defendant.

Order Sustaining Demurrer and Final Judgment.

This cause coming on for hearing on the amended demurrer of defendant to the amended complaint of plaintiff, and the court having examined said amended complaint and each and all of the allegations thereof, and being of the opinion, for the reasons heretofore assigned by this court now on file in this cause, that said demurrer to said amended complaint should be sustained:

Now, therefore, it is here and now Ordered, Adjudged and Decreed that said demurrer be and the same is here and now sustained.

The plaintiff having elected to stand upon said amended complaint and having refused to plead further in said action, it is here and now Ordered, Adjudged and Decreed that said action be and the same is here and now dismissed *with* prejudice and with costs to defendant.

Done in open court this 8th day of June, 1912.

FRANK H. RUDKIN, *Judge.*

Copy of within order received and service of same acknowledged this 27th day of May, 1912.

EDWARD JUDD, AND
S. S. LANGLAND,
Attorneys for Plaintiff.

Indorsed: Order Sustaining Demurrer and Final Judgment. Filed in the U. S. District Court, Western Dist. of Washington, June 8, 1912. A. W. Engle, Clerk. By S., Deputy.

46 In the United States District Court for the Western District of Washington, Northern Division.

No. 1969.

THOMAS CHRISTIANSON, Plaintiff,
vs.
THE COUNTY OF KING, Defendant.

Petition for Writ of Error.

Thomas Christianson, plaintiff in the above entitled action, feeling himself aggrieved by the judgment entered in the above entitled action on the 8th day of June, 1912, comes now by Edward Judd, S. S. Langland and W. A. Keene, his attorneys, and petitions said court for an order allowing said plaintiff to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, and also for an order fixing the amount of security which the said plaintiff shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in said District Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray, etc.

EDWARD JUDD,
S. S. LANGLAND,
W. A. KEENE,
Attorneys for Plaintiff.

Received a copy of the within Petition this 14th day of June, 1912.

JOHN F. MURPHY,
ROBERT H. EVANS,
Attorneys for Defendant.

Indorsed: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 17, 1912. A. W. Engle, Clerk. By S., Deputy.

47 In the United States District Court for the Western District of Washington, Northern Division.

No. 1969.

THOMAS CHRISTIANSON, Plaintiff,
vs.
THE COUNTY OF KING, Defendant.

Assignment of Errors.

And now comes the above named plaintiff, Thomas Christianson, by his attorneys, Edward Judd, S. S. Langland and W. A. Keene, and in connection with his petition for a writ of error herein, makes the following Assignment of Errors which he will urge upon the prosecution of his said writ of error in the above entitled action, and which he avers occurred upon the trial and hearing of said action, to-wit:

1. The Court erred in sustaining the defendant's amended demurrer to the plaintiff's amended complaint.

2. The Court erred in not overruling the defendant's amended demurrer to the plaintiff's amended complaint.

3. The Court erred in not requiring the defendant to answer the amended complaint of the plaintiff.

4. The Court erred in rendering and entering the judgment in the above entitled action dismissing the action of the plaintiff.

Wherefore said plaintiff, Thomas Christianson, prays that said judgment of the District Court of the United States for the Western District of Washington, Northern Division, be reversed, and that said Court be instructed to overrule the defendant's amended demurrer to the plaintiff's amended complaint, and require the defendant to answer said amended complaint, and proceed with the further hearing of the action in the above entitled action in accordance with law.

EDWARD JUDD,
S. S. LANGLAND,
W. A. KEENE,
Attorneys for Plaintiff.

48 Received a copy of the within Assignment of Errors this 14th day of June, 1912.

JOHN F. MURPHY,
ROBERT H. EVANS,
Attorneys for Defendant.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, June 17, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 1969.

THOMAS CHRISTIANSON, Plaintiff,
vs.
THE COUNTY OF KING, Defendant.

Order Allowing Writ of Error.

Upon motion of Edward Judd, S. S. Langland and W. S. Keene, attorneys for plaintiff in the above entitled action, and upon the filing of the petition for a writ of error and an assignment of errors in this action;

It is Ordered, that a writ of error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error, such bond to act as a supersedeas thereon, be and is hereby fixed at Three Hundred Dollars.

Done in open Court this 21st day of June, 1912.

FRANK H. RUDKIN, *Judge.*

O. K. as to amount of bond.
JOHN F. MURPHY,
ROBERT EVANS,
Attorneys for Defendant.

49 Indorsed: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 21, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 1969.

THOMAS CHRISTIANSON, Plaintiff,
vs.
THE COUNTY OF KING, Defendant.

Bond on Writ of Error.

Know all men by these presents:

That Thomas Christianson, above named as principal, and American Surety Company, of New York, a corporation organized under the laws of the State of New York, as surety, are held and firmly bound unto the County of King, defendant above named, in the full and just sum of Three Hundred Dollars, to be paid to the said

defendant, to which payment well and truly to be made the said principal binds himself and his heirs, executors, administrators and assigns, and the said surety binds itself, its successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 17th day of June, 1912.

The condition of the above obligation is such that:

Whereas, lately, at a session of the District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in said Court between the said Thomas Christianson, as plaintiff, and the said County of King as defendant, there was on the 8th day of June, 1912, rendered a final judgment against said plaintiff for the costs of suit; and

Whereas, the said plaintiff has obtained from the said
50 District Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant has been issued citing and admonishing the defendant to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at San Francisco, California, or at such place as may be provided by law; now, therefore,

If the said Thomas Christianson shall prosecute his writ of error to effect, and shall answer all damages and costs that may be awarded against him if he fails to make his plea good, then the above obligation is to be void; otherwise to remain in full force and effect.

THOMAS CHRISTIANSON, [SEAL.]
By EDWARD JUDD, *His Attorney.*

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By EDWARD LYONS,
Resident Vice-President,
S. H. MELROSE,
Resident Assistant Secretary.

The sufficiency of the surety to the foregoing bond approved by me this 21st day of June, 1912.

FRANK H. RUDKIN,
District Judge.

O. K. as to form.

JOHN F. MURPHY,
ROBERT H. EVANS,
Attorneys for Defendant.

Indorsed: Bond on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 21, 1912. A. W. Engle, Clerk. By S., Deputy.

51 In the United States District Court for the Western District of Washington, Northern Division.

No. 1969.

THOMAS CHRISTIANSON, Plaintiff,
vs.
THE COUNTY OF KING, Defendant.

Præcipe for Transcript of Record.

To the Clerk of the Above Entitled Court:

You will please prepare and certify a transcript for the United States Circuit Court of Appeals for the Ninth Circuit, consisting of the following files, records and papers in the above entitled case:

1. Complaint. Filed April 24, 1911.
2. Amended Demurrer to Complaint. Filed May 25, 1911.
3. Opinion. Filed May 8, 1912.
4. Order Sustaining Amended Demurrer to Complaint. Filed May 16, 1912.
5. Order Allowing Amendment of Complaint. Filed May 27, 1912.
6. Amended Complaint. Filed May 27, 1912.
7. Order Sustaining Amended Demurrer to Amended Complaint and Judgment. Filed June 8, 1912.
8. Petition for Writ of Error. Filed June 17, 1912.
9. Assignment of Errors. Filed June 17, 1912.
10. Order Allowing Writ of Error and fixing Bond.
11. Writ of Error and Copy and Proof of Service.
12. Citation and Copy and Proof of Service.
13. Bond.
14. Præcipe.

EDWARD JUDD,
S. S. LANGLAND,
W. A. KEENE,
Attorneys for Plaintiff.

52 Indorsed: Præcipe for Transcript of Record. Filed in the U. S. District Court, Western Dist. of Washington, June 21, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1969.

THOMAS CHRISTIANSON, Plaintiff in Error,
vs.
THE COUNTY OF KING, Defendant in Error.

Clerk's Certificate to Transcript of Record.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, A. W. Engle, Clerk of the District Court of the United States, for the Western District of Washington, do hereby certify the foregoing fifty-five printed pages, numbered from one to fifty-five, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause as is called for by the Præcipe of the Attorneys for Plaintiff in Error, as the same remain of record and on file in the office of the Clerk of the said Court, and that the same constitutes the return to the Writ of Error received and filed in the office of the Clerk of the said District Court on June 21, 1912.

I further certify that I annex hereto and herewith transmit the original Writ of Error and Citation in said cause.

I further certify that the cost of preparing and certifying the foregoing return to Writ of Error is the sum of Sixty-five Dollars and Ninety-five Cents ($65.95), and that the said sum has been paid to me by Messrs. Edward Judd, Samuel S. Langland and Walter A. Keene, of counsel for Plaintiff in Error.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 25th day of July, 1912.

[SEAL.] A. W. ENGLE, *Clerk.*

53 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1969.

THOMAS CHRISTIANSON, Plaintiff in Error,
vs.
THE COUNTY OF KING, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the County of King and to John F. Murphy and Robert H. Evans, Defendant's Attorneys:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be

held at the City of San Francisco, in the State of California, on the 21st day of July, 1912, pursuant to a Writ of Error filed in the Clerk's office for the District Court of the United States for the Western District of Washington, Northern Division, wherein Thomas Christianson is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 21st day of June, 1912.

[SEAL.] C. H. HANFORD,
District Judge, Presiding in the United States District Court for the Western District of Washington, Northern Division.

We hereby accept due personal service of the foregoing Citation on behalf of The County of King, Defendant in Error, and for ourselves as Defendant's Attorneys, this 9th day of July, 1912.

JOHN F. MURPHY,
ROBERT H. EVANS,
Attorneys for Defendant in Error, The County of King.

54 Indorsed: Original. In the United States Circuit Court of Appeals for the Ninth Circuit. Thomas Christenson, Plaintiff in Error, vs. The County of King, Defendant in Error. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Jun 21, 1912. A. W. Engle, Clerk, by S., Deputy. Edward Judd, S. S. Langland, W. A. Keene, Attorneys for Plaintiff, 620 New York Block, Seattle, Washington.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1969.

THOMAS CHRISTIANSON, Plaintiff in Error,
vs.
THE COUNTY OF KING, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judge of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, between Thomas Christianson, Plaintiff, and The County of King, Defendant, a manifest error has happened to the great damage of the said Plaintiff, Thomas Christianson, and it being fit, and we being willing that the error, if any there hath been, should be duly

corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your Seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit; together with this Writ, so that you have the same at the City of San Francisco, in the State of California, on the 21st
55 day of July, 1912, in said Circuit Court of Appeals, to be then and there held, and that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done -herein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 21st day of June, in the year of our Lord, one thousand nine hundred and twelve, and of the Independence of the United States one hundred and thirty-sixth.

[SEAL.] A. W. ENGLE,
Clerk of the District Court of the United States for the Western District of Washington, Northern Division.
By F. A. SIMPKINS,
Deputy Clerk.

The foregoing Writ is allowed by me this 21st day of June, 1912.
C. H. HANFORD,
District Judge, Presiding in the United States District Court for the Western District of Washington, Northern Division.

We hereby accept due personal service of the foregoing Writ of Error on behalf of The County of King, defendant in error, this 9th day of July, 1912, and acknowledge receipt of a copy of said Writ of Error, copy of Bond on Writ of Error, copy of Assignment of Errors, copy of Petition for Writ of Error, and copy of Order Allowing Writ of Error.

JOHN F. MURPHY,
ROBT. H. EVANS,
Attorneys for The County of King, Defendant in Error.

Indorsed: Original. In the United States Circuit Court of Appeals for the Ninth Circuit. Thomas Christenson, Plaintiff in Error vs. The County of King, Defendant in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Jun- 21, 1912, A. W. Engle, Clerk, by S., Deputy. Edward Judd, S. S. Langland, W. A. Keene, Attorneys for Plaintiff, 620 New York Block, Seattle, Washington.

56 [Endorsed:] No. 2163. United States Circuit Court of Appeals for the Ninth Circuit. Thomas Christianson, Plaintiff in Error, vs. The County of King, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division. Received Jul- 29, 1912. F. D. Monckton, Clerk. Filed Aug. 28, 1912. F. D. Monckton, Clerk.

57 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2163.

THOMAS CHRISTIANSON, Plaintiff in Error,
vs.
THE COUNTY OF KING, Defendant in Error.

ADDENDA.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

58 Index to Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2163.

THOMAS CHRISTIANSON, Plaintiff in Error,
vs.
THE COUNTY OF KING, Defendant in Error.

59 United States Circuit Court of Appeals for the Ninth Circuit.

At a Stated Term, to wit, the October Term, A. D. 1911, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the Eleventh Day of September, in the Year of Our Lord One Thousand Nine Hundred and Twelve.

Present:

Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable William W. Morrow, Circuit Judge.

No. 2163.

THOMAS CHRISTIANSON, Plaintiff in Error,
vs.
THE COUNTY OF KING, Defendant in Error.

Order of Submission.

Ordered, above-entitled cause argued by Mr. Edward Judd, counsel for the plaintiff in error, and by Mr. Robert H. Evans, counsel for the defendant in error, and submitted to the Court for consideration and decision, with leave to Mr. Judd to file a reply-brief, and with leave to Mr. Evans to file a memoranda of additional authorities.

60 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2163.

THOMAS CHRISTIANSON, Plaintiff in Error.
vs.
THE COUNTY OF KING, Defendant in Error.

[*Opinion, U. S. Circuit Court of Appeals.*]

Writ of Error to the United States District Court for Western District of Washington, Northern Division.

Statutory action of ejectment to recover possession of real property and to quiet title to same in the plaintiff.

The complainant is a subject of the Kingdom of Norway. The defendant is a municipal corporation organized under the laws of the State of Washington. The action is in ejectment. The complainant claims to be one of the heirs, and the grantee of all the other heirs, of one Lars Torgerson Grotnes, who died in King County, in the then Territory of Washington, in March, 1865. The

decedent left an estate which included the land described in the complaint. The estate was administered in the Probate Court and no heirs appearing to claim the estate, it was, by a final decree of distribution entered in the Probate Court, escheated to the County of King, in the then Territory of Washington.

61 The land in controversy is within the limits of the City of Seattle, in the present State, and former Territory, of Washington. The original tract contained one hundred and sixty acres. The defendant obtained control of the land in 1869, under claim of title of an escheated estate. The defendant is using a portion of the tract in connection with its County Hospital. Another portion is used as a Poor Farm. Another portion, described as the King County Addition to Seattle, has been subdivided and a large part sold in lots. Another portion, described as the King County Second Addition to Seattle, has been subdivided and a considerable part of that addition has been sold in lots. The original tract is traversed by many highways and railroad rights of way.

The plaintiff disclaims any purpose of disturbing the public, or the railroad, in the easements acquired in the property, or persons holding lands as innocent purchasers from the defendant. The purpose of the action, as declared by the plaintiff, is to recover the land occupied by the King County Hospital, the King County Farm, and such lands as remain unsold in the King County Additions to Seattle.

The plaintiff also concedes that the defendant may retain the buildings placed by it upon the Hospital Grounds.

It appears from the amended complaint that Lars Torgerson Grotnes was born in the City of Porsgrund, in the Kingdom of Norway, on the 30th day of August, 1829; that at the age of about twenty-one years he shipped as a sailor from his native city and went by way of England to Australia, and thence in the year 1856 to the City of San Francisco, in the State of California; that while in the harbor of San Francisco, Grotnes deserted the ship on which he was employed, and changed his name from Lars Torgerson Grotnes to John Thompson, in order to conceal his identity and avoid apprehension. He then went to the neighborhood of Elliott

62 Bay in King County, in the then Territory of Washington, and resided in King County and in Kitsap County, in that Territory, until the time of his death in March, 1865.

That he acquired title to the land described in the amended complaint under the name of John Thompson.

In the amended complaint the proceedings in the Probate Court of King County, Territory of Washington, are set forth, from which it appears that on the 26th day of March, 1865, one Daniel Bagley was appointed administrator of the estate of John Thompson by the Probate Court of the County of King, in the Territory of Washington; and on the 26th day of May, 1868, the County Commissioners of King County presented to the Probate Court a petition aver-ing that they were informed that Thompson's administrator had a large sum of money in his hands; that no heirs had appeared to claim the same; that they believed no heirs were known to exist; that

King County was entitled to the balance in the administrator's hands, and praying for an order requiring the administrator to account and pay the balance in his hands to the Treasurer of said King County. A citation was thereupon issued by said Probate Court, reciting the contents of said petition, and commanding the administrator to show cause why the order asked for should not be entered. This citation was served upon the administrator on May 27th, 1868, and thereafter, on February 12th, 1869, the administrator petitioned the court for a disposition of the estate. In pursuance of this petition the court directed the publication of a notice of a hearing upon such petition, for four successive weeks, in a newspaper published in King County. The notice was published as directed, and a hearing had upon the petition, and thereafter a final decree was entered distributing the residue of the "estate to the County of King, in Washington Territory."

63 The complaint avers that this decree was null and void; that the said Probate Court was wholly without jurisdiction to in any manner vest, transfer, convey, fix or pass upon the title to the land described in said decree, and had no power or authority to declare said land escheated; that all claims to said land by the defendant, and all acts done by the defendant in reference to said land, and all control exercised or attempted to be exercised by the defendant over said land, had been made, done, performed and exercised, under and by virtue of said null and void decree; that the defendant had not, and never had had any contract, deed, conveyance, decree, judgment nor other writing, record or document evidencing, or purporting to evidence, any title on its part in or to said land; that the defendant had never at any time begun or instituted any suit or legal proceeding of any nature before any court, officer or tribunal, for the purpose of having an escheat of said land adjudicated, adjudged or declared; nor had any other authority or officer ever begun or instituted any such suit or legal proceeding; that the defendant had never at any time begun or instituted any suit or legal proceeding of any nature before any court, officer or tribunal, for the purpose of having any title, or claim of title, which it had or might have in said land, established, approved, confirmed or quieted; nor had any other public authority or officer ever begun or instituted any such suit or legal proceeding.

The complaint further avers that after the entry of said decree, the land described therein was marked upon the assessor's roll as county property and as exempt from taxation, and had ever since been so treated, except certain portions thereof which the defendant had assumed to convey to private parties by deed; that about the year 1885, the County of King, in the then Territory of Washington,

64 occupied a certain portion of the tract of land described in said complainant, which said portion remained in its occupancy and after the organization of the State of Washington, had remained in the control of the defendant, and was generally known as the "King County Farm"; that this tract of land had never been used for any county purposes, but had been let out to tenants for the purpose of being farmed and producing a monetary

income for the county; that about the year 1900, the defendant occupied a portion of the tract, which portion was known as the "King County Hospital Grounds," that the defendant had placed upon the last mentioned tract of land valuable improvements in the shape of a hospital building and its appurtenances, the exact value of which was to the plaintiff unknown, and since thus occupying the same ha[illegible]een and was then using it for county hospital purposes; that in the year 1892, the defendant assumed to make a plat of a certain portion of the tract, called "King County Addition to the City of Seattle," and caused the said plat to be recorded in the office of the Auditor of King County; that the defendant had assumed to sell and convey to private parties all of the land composing said Addition, except certain portions which were specially described in the complaint; that in the year 1903, the defendant had assumed to make a plat of a certain portion of the tract, called "King County 2nd Addition to the City of Seattle," and caused said plat to be recorded in the office of the Auditor of said King County; that the defendant had assumed to sell and convey to private parties all of the land composing said last named addition, except certain portions which were particularly described in the complaint; that the tracts of land described as the "King County Farm"; "King County Hospital Grounds"; "King County Addition to the City of Seattle"; and "King County 2nd Addition to the City of
65 Seattle," together comprise the whole of the tract described in said complaint as being the property belonging to Lars Torgerson Grotnes, except certain portions which had been appropriated for public or quasi-public purposes, for railroad rights of way or highways.

The complaint further avers that the plaintiff is a son of the sister of Lars Torgerson Grotnes, and one of his heirs at law; that all of the other now living heirs at law of said Lars Torgerson Grotnes had by proper mesne conveyances, conveyed their right, title and interest in and to the land described in the complaint to the plaintiff, who was then the sole owner in fee thereof.

It is further averred that the heirs at law of Lars Torgerson Grotnes had no knowledge of what had become of him, and did not learn about his death and the place in which he died, nor of the fictitious name which he had assumed, until within three years last part; that since learning thereof, such heirs, and particularly the plaintiff, have been diligently engaged in searching for and procuring the proper proofs of the identity of Lars Torgerson Grotnes and John Thompson, and his relationship to them.

To the amended complaint the defendant interposed a demurrer on the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action, and that the action had not been commenced within the time limited by law.

The trial court sustained the demurrer, and thereupon dismissed the cause of action.

Edward Judd, S. S. Langland and W. A. Keene, for Plaintiff in Error.

John F. Murphy and Robert H. Evans, for Defendant in Error.

Before Gilbert, Ross and Morrow, Circuit Judge-.

MORROW, Circuit Judge (after stating the facts as above) delivered the opinion of the Court:

66 The main question to be determined is the jurisdiction of the Probate Court of King County at the time it entered the decree escheating the estate of John Thompson in favor of the defendant. Had the court jurisdiction to enter that decree?

The Territory of Washington was established by the Act of Congress, approved March 2, 1853 (10 Stat. 172). The act provided for the exercise of executive, legislative and judicial power and authority in the territory.

By Section 4 of the Act it was provided:

"That the legislative power and authority of said Territory shall be vested in a legislative assembly, which shall consist of a Council and House of Representatives."

By Section 6 it was provided:

"That the legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil. * * * All the laws passed by the legislative assembly shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect."

The act provides a number of restrictions upon the legislative authority of the Assembly. But no restriction is placed upon the legislative authority in conferring jurisdiction upon the courts established by the Act.

By Section 9 it was provided:

"That the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. * * * The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace, shall be as limited by law."

Under this statute it was perfectly competent for the legislative assembly to establish Probate Courts, and confer upon them full power and authority in all probate proceedings. And this
67 appears to have been done, originally, by the Act of April 14, 1854 (Laws of Washington, Session Acts 1854-1862, page 315), and subsequently by the more elaborate statute entitled, "The Probate Act" passed January 16, 1863, (Laws of Washington, 1863, page 198, etc.). This last act was in force at the time of the death of Thompson (Grotnes) in March, 1865, and during the probate proceedings relating to his estate, from March 26, 1865, to the final decree of distribution on May 26, 1869.

Chapter I related to the Probate Court, its powers and jurisdiction. It was provided by Section 3 of that Chapter, "That said Probate Courts shall have and possess the following powers: Exclusive original jurisdiction within their respective counties in all cases relative to the probate of last wills and testaments; the granting of letters testamentary and of administration, and revoking the same. * * * in the settlement and allowance of accounts of executors,

administrators and guardians; * * * to allow or reject claims against estates of deceased persons as hereinafter provided; to award process and cause to come before said court all and every person or persons whom they may deem it necessary to examine, whether parties or witnesses, or who, as executors, administrators or guardians, or otherwise, shall be entrusted with or in any way be accountable for any lands, tenements, goods or chattels, belonging to any * * * estate of any deceased person, with full power to administer oaths and affirmations, and examine any person touching any matter of controversy before said court, or in the exercise of its jurisdiction. * * *

Section 4 provided: "The said court shall provide and keep a suitable seal."

Section 5 provided: "That the court established by this act shall be a court of record, and shall keep just and faithful records of its proceedings, and shall have power to issue any and all writs which may be necessary to the exercise of its jurisdiction."

68 Section 10 provided: "That all process issuing out of the probate court, shall be attested by the clerk, and sealed with the seal of the court, and shall be served in the same manner as process issuing out of the district court."

Chapter XVI of the act related to partition and distribution of estates in probate. Section 317 of that chapter provided:

"Upon the settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or any heir, devisee or legatee, the court shall proceed to distribute the residue of the estate, if any, among the persons who are by law entitled."

Section 318 provided: "In the decree the court shall name the person and the portion, or parts to which each shall be entitled; and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same in possession."

These provisions of the statute gave the probate courts full power and authority within their respective counties of the subject matter of probate proceedings in the administration of the estates of deceased persons; and this jurisdiction carried with it the presumption of the integrity of the judgment, the same as does the judgment of a court of general jurisdiction. Magee v. Big Bend Land Co. 51 Wash. 406, 410.

"In so far as probate courts have general jurisdiction, their records need not affirmatively show the existence of facts upon which the exercise of their jurisdiction depends. And the rule applies even though the court is one of limited jurisdiction where it is invested with full authority over probate and testamentary matters and is a court of record."

11 Cyc. page 697.

69 In this case it appears affirmatively from the record that the proceedings were in substance in conformity with the statute and in our opinion gave the court jurisdiction of the subject matter.

The next question is, did the statute further provide a method of procedure whereby the court would obtain jurisdiction over all parties interested in such estates?

Section 319 provides: "The decree may be made on the application of the executor or administrator, or of any person interested in the estate, and shall only be made after notice has been given in the manner required in regard to the application for the sale of land by an executor or administrator."

The notice required to be given upon an application by the executor or administrator for the sale of land was provided in Section 219 of the act as follows: The order to show cause why an order should not be granted to the executor or administrator for the sale of real estate was required to be "personally served on all persons interested in the estate at least ten days before the time appointed for hearing the petition, or be published at least four successive weeks in such newspaper as the court shall order."

It appears from the record that the notice was by order of the court published in a newspaper in King County for four successive weeks, and that the hearing upon said notice was fixed for the 26th day of April, 1869, and such proceedings were thereupon had that a final decree of distribution was entered in said estate on the 26th day of May, 1869.

This decree recited among other things that the administrator had, on the 12th day of February, 1869, petitioned for an order settling and allowing his final account; that a time had been fixed for hearing the application for a decree of distribution, and that due and legal notice of such hearing had been given.

70 It is averred that the decree of distribution recited:

"That said administrator has fully accounted for all the estate that has come to his hands, and that the whole estate, so far as it has been discovered, has been fully administered, and the residue thereof, consisting of the property hereinafter particularly described, is now ready for distribution.

"That all the debts of said decedent and of said estate, and all the expenses of the administration thereof thus far incurred, and all taxes that have attached to or accrued against the said estate, have been paid and discharged, and said estate is now in a condition to be closed.

"That said decedent died intestate in the County of King, Washington Territory, on the — day of March, A. D. 1865, leaving no heirs surviving him; * * *

"There being no heirs of said decedent, that the entire estate escheat to the County of King, in Washington Territory.

"Now on this 26th day of May, A. D. 1869, on motion of said Daniel Bagley, administrator of said estate, and no exceptions or objections being filed or made by any person interested in the said estate or otherwise;

"It is hereby ordered, adjudged and decreed: that all the acts and proceedings of said administrator, as reported by this court and as appearing upon the records thereof, be and the same are hereby approved and confirmed; and that after deducting said estimated expenses of closing the administration, the residue of said estate of

John Thompson, deceased, not heretofore distributed, hereinafter particularly described, and now remaining in the hands of said administrator, and any other property not now known or discovered which may belong to the said estate, or in which the said estate may have any interest, be and the same is hereby distributed as follows, to wit: The entire estate to the County of King, in Wash-
71 ington Territory."

Then follows a particular description of the residue of the estate referred to in the decree.

Proceedings in probate being essentially in rem, a statute providing for a constructive notice by publication gives notice to the whole world.

As said by the Supreme Court of California in William Hill Co. v. Lawler, 116 Cal. 359, 362, 48 Pac. 323:

"A proceeding for distribution is in the nature of a proceeding in rem, the res being the estate which is in the hands of the executor under the control of the court, and which he brings before the court for the purpose of receiving directions as to its final disposition. By giving the notice directed by the statute the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate; and any person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appear and present his claim, or fail to appear, the action of the court is equally conclusive upon him, 'subject only to be reversed, set aside, or modified on appeal.' The decree is as binding upon him if he fail to appear and present his claim, as if his claim after presentation had been disallowed by the court."

In the case of Broderick's Will, (88 U. S. 21 Wall. 503) persons claiming to be the heirs of Senator Broderick sought by a suit in equity to avoid the sale of certain property of the estate in the probate proceedings upon substantially the same grounds as in the present case. The probate proceedings were upheld, and the court, referring to the probate proceedings, said:

72 "The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and consequently that there should be some convenient jurisdiction and mode of proceeding by which the devolution may be affected with least chance of injustice and fraud, and that the result obtained should be firm and perpetual."

In Goodrich v. Ferris, 214 U. S. 71, 80; 145 Fed. 844, the action was to set aside a final decree of distribution of an estate in probate in the state court on the ground that the notice of the hearing given under the statute did not as to the complainant amount to due process of law. The bill was dismissed in the lower court and on appeal to the Supreme Court the judgment of dismissal was affirmed. The Supreme Court said:

"It is elementary that probate proceedings by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same is in the nature of a proceeding

in rem and is, therefore, one as to which all the world is charged with notice."

In our opinion the proceedings under the statute were sufficient to give the court jurisdiction over all parties claiming interest in the estate.

The next question is, did the probate court have authority to distribute the residue of the estate to King County by a judgment of escheat?

Section 340 provides: "When any person shall die seized of any lands, tenements or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, as follows: * * *

"If the intestate shall leave no kindred, his estate shall escheat to the county in which such estate may be situate."

73 The plaintiff contends that the Probate Court had no power or authority to distribute the estate of the deceased to King County; that during the territorial period the United States was the sovereign and to this sovereign alone could an estate be distributed by a judgment of escheat.

Admitting the sovereignty of the United States in the Territory, and that the residue of an unclaimed estate in such territory is primarily vested in that sovereignty, it does not follow that the United States cannot divest itself of its right of escheat and place it elsewhere. Congress has never passed an act providing for escheating of estates, but has always left the matter with the territory during the territorial period, and with the states after the states have been formed. Crane v. Reeder, 21 Mich. 24, 75.

The validity of the Washington statute was recognized by the Supreme Court of the State in Territory v. Klee, 1 Wash. 183, 187, and by this court in Pacific Bank v. Hanna, 90 Fed. 72.

By Section 6 of the Act of March 2nd, 1853, (10 Stat. 172), establishing the territorial government of Washington, it was provided that the legislative power of the territory should extend to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States. Territorial legislation providing for escheating of unclaimed estates in the territory was not inconsistent with the Constitution and laws of the United States. The contention that it was inconsistent with the prohibition of the statute, "that no law shall be passed interfering with the primary disposal of the soil" is not applicable to this case, and cannot be sustained as an objection to the decree. That restriction was intended by Congress to prohibit the territorial *legislation* from passing a law interfering with the

74 authority of Congress to direct the manner in which the public domain of the United States should be disposed of to those settling upon it, or claiming it under the public land laws of the United States. The land involved in this case was originally part of the public domain, but it had been segregated and disposed of by the United States and conveyed to a grantee by patent. The deceased held that title at the time of his death derived by mesne conveyance from the original grantee. The judgment of escheat had, therefore, nothing whatever to do with the primary

disposal of this land. Furthermore, it was provided in the Act of Congress that all laws passed by the legislative assembly should be submitted to the Congress of the United States, and if disapproved, should be null and of no effect. It will be presumed, in the absence of evidence to the contrary, that the laws passed by the legislative Assembly, including the Probate Act, were submitted to the Congress of the United States, and were not disapproved, and that the provision providing for the escheating of unclaimed estates to the counties in which such estates were situate was in effect approved as a rightful exercise of the legislative power of the territory.

In the act of territorial legislation regulating the practice and proceedings in civil actions, approved April 28th, 1854, it was provided in Section 480, (Session Laws of Washington, page 218), that: "Whenever any property shall escheat or be forfeited to the territory for its use, the legal title shall be deemed to be in the territory from the time of escheat or forfeiture, and an information may be filed by the prosecuting attorney in the District Court for the recovery of the property, alleging the ground on which the recovery is claimed, and like proceedings and judgment shall be had as in a civil action for the recovery of property."

It is contended that an escheat could only be decreed under
75 this statute by a common law action in the District Court for the recovery of property, but in the Civil Practice Act of January 28th, 1863, Section 519, (Stats. 1863, page 192), Section 480 of the Act of 1854 was re-enacted with respect to the forfeiture of property, and the provision relating to civil actions for the recovery of escheated property was omitted. It was further provided in Section 547 of the Act of 1863 that, "All acts or parts of acts heretofore enacted upon any subject matter contained in this act be, and the same are hereby, repealed."

This action of the legislature not only disposes of the contention that a civil action was required to secure a judgment of escheat in this case, but it confirms the jurisdiction of the Probate Court under the Probate Act of January 6th, 1863, to enter such a judgment.

We are of the opinion also that the statute of limitations is an effectual bar to this action.

It was provided in Section 17 of the Civil Practice Act of 1863, (Laws of Washington, 1863, page 86), that the period for the commencement of civil actions should be as follows: Within twenty years: "1st—Actions for the recovery of real property, or for the recovery of the possession thereof, and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of the action."

By the Act to regulate the practice and proceedings in civil actions, approved December 7th, 1881, Section 26, (Code of Washington, 1881, page 39), the period of limitation was reduced to ten years.

The judgment of escheat was entered in this case on May 26, 1869.
This action was commenced by the plaintiff on April 24,
76 1911, or nearly forty-two years after the entry of the judgment. The allegations of the complaint as to certain acts of

the defendant with respect to occupancy of the premises in controversy are not sufficient to stay the running of the statute of limitations, nor was the statute stayed by the allegation that neither the heirs of the decedent, nor the plaintiff, learned of the death of Grotnes, the place of his death, and the fictitious name which he had assumed, until within three years last past, and that since learning thereof, the heirs, and particularly the plaintiff, had been diligently engaged in searching for and procuring the proper proof of the identity of Lars Torgerson Grotnes and John Thompson, and his relationship to them.

In the case of Broderick's Will, supra, it was alleged in the complaint that complainants had no knowledge or information of Broderick's death, nor of the forgery of the will, nor *if* its presentation for probate, nor of the probate or order of sale, nor of any of the proceedings, until the last day of December, 1866, within three years of filing the bill, and that since that time they had been diligently endeavoring to discover the facts and the evidence relating thereto. It was provided by the Statute of Limitations of the State of California that actions for relief on the ground of fraud could only be commenced within three years. The Supreme Court, commenting upon this statute, said:

"It is true that it is added that the cause of action in such case is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. But that is only the application to cases at law of a principal which has always been acted upon in courts of equity. If fraud is kept concealed so as not to come to the knowledge of the party injured, those courts will not charge him with laches or negligence in the vindication of his rights
77 until after he has discovered the facts constituting the fraud. And this is most just. But that principle cannot avail the complainants in this case. By their own showing their delay was due, not to ignorance of the fraud, nor any attempt to conceal it, but to ignorance of Broderick's death, and all the open and public facts of the case. * * * They do not pretend that the facts of the case were shrouded in concealment, but their plea is that they lived in a remote and secluded region, far from means of information, and never heard of Broderick's death, or of the sale of his property, or of any events connected with the settlement of his estate, until many years after these events had transpired. Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings in rem.

If a court of equity could not afford relief against the running of the Statute of Limitations in the case of Broderick's heirs, it is plain that a court of law could not in a suit of ejectment afford relief against the running of a similar statute in the present case.

The judgment of the court below is affirmed.

(Endorsed:) Opinion. Filed March 10, 1913. F. D. Mockton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

78 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2163.

THOMAS CHRISTIANSON, Plaintiff in Error,
vs.
THE COUNTY OF KING, Defendant in Error.

[*Judgment, U. S. Circuit Court of Appeals.*]

In Error to the District Court of the United States for the Western District of Washington, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for its costs herein expended, and have execution therefor.

[Endorsed:] Judgment, U. S. Circuit Court of Appeals. Filed and Entered March 10, 1913, (Signed) F. D. Monckton, Clerk.

79 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2163.

THOMAS CHRISTIANSON, Plaintiff in Error,
vs.
COUNTY OF KING, Defendant in Error.

Petition for Writ of Error Returnable in Supreme Court of the United States.

Thomas Christianson, plaintiff in error in the above entitled action, feeling himself aggrieved by the judgment entered in the above-entitled action on the 10th day of March, 1913, comes now by Livingston B. Stedman, Edward Judd and S. S. Langland, his attorneys, and petitions said court for an order allowing the said plaintiff in error to prosecute a Writ of Error to the Honorable Supreme Court of the United States, under and according to the

laws of the United States in that behalf made and provided, and also for an order fixing the amount of security which the said plaintiff in error shall give and furnish upon said Writ of Error, and that upon the giving of such security, all further proceedings in said Circuit Court of Appeals be suspended and stayed until the determination of said Writ of Error by the Supreme Court of the United States.

And your petitioner will ever pray, etc.

(Signed) LIVINGSTON B. STEDMAN,
EDWARD JUDD,
S. S. LANGLAND,
Attorneys for Plaintiff in Error.

80 Received copy of the within petition this 19th day of November, 1913.

(Signed) JOHN F. MURPHY,
ROBERT H. EVANS,
Attorneys for Defendant in Error.

[Endorsed:] Petition for Writ of Error Returnable in Supreme Court of the United States. Filed Nov. 26, 1913. (Signed) F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

81 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2163.

THOMAS CHRISTIANSON, Plaintiff in Error,
vs.
COUNTY OF KING, Defendant in Error.

Assignment of Errors.

And now comes the above named plaintiff in error, Thomas Christianson, by Livingston B. Stedman, Edward Judd and S. S. Langland, and in connection with his petition for a Writ of Error herein to the Supreme Court of the United States, makes the following Assignment of Errors which he will urge upon the prosecution of his said Writ of Error in the above entitled action, and which he avers occurred upon the trial and hearing of said action:

1. The Court erred in affirming the judgment of the District Court.

2. The Court erred in not reversing the judgment and remanding the cause with instructions to the District Court to overrule the amended demurrer to the amended complaint, and proceed with the cause according to due course of law.

3. The Court erred in holding that the Territorial Probate Court had jurisdictoin of the subject matter of entering the decree escheating the estate of John Thompson in favor of the defendant in error.

[Endorsed:] Order allowing writ of error returnable in the Supreme Court of the United States. Filed Nov. 26, 1913. (Signed) F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

85 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2163.

THOMAS CHRISTIANSON, Plaintiff in Error,
vs.
COUNTY OF KING, Defendant in Error.

Bond on Writ of Error Returnable in the Supreme Court of the United States.

Know all men by these presents:

That Thomas Christianson, above named, as principal, and Illinois Surety Company, a Corporation organized under the laws of the State of Illinois, as surety, are held and firmly bound unto the County of King, defendant in error above named, in the full and just sum of Five Hundred Dollars ($500.00), to be paid to the said defendant in error, to which payment well and truly to be made the said principal binds himself, and his heirs, executors, administrators and assigns, and the said surety binds itself, its successors and assign jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of November, 1913.

The condition of the above obligation is such that:

Whereas, lately, at a session of the United States Circuit Court of Appeals for the Ninth Circuit, in a suit pending in said Court between said Thomas Christianson as plaintiff in error, and the said County of King as defendant in error, there was, on the 10th day of March, 1913, rendered a final judgment against said plaintiff in error for the costs of suit; and

Whereas, the said plaintiff in error has obtained from the said United States Circuit Court of Appeals a Writ of Error to
86 reverse the judgment of said Court in the suit aforesaid, and a citation directed to the said defendant in error has been issued citing and admonishing the said defendant in error to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, or at such place as may be provided by law;

Now therefore, if the said Thomas Christianson shall prosecute his Writ of Error to effect, and shall answer all damages and costs that may be awarded against him if he fails to make his plea good, then the above obligation is to be void; otherwise to remain in full force and effect.

THOMAS CHRISTIANSON, [SEAL.]
(Signed) By EDWARD JUDD, *His Attorney.*
ILLINOIS SURETY COMPANY,
(Signed) By FRANK G. OPIE, *Its Attorney in Fact.*

The sufficiency of the surety to the foregoing Bond approved by me this 26th day of November, 1913.

(Signed) WM. W. MORROW,
Circuit Judge.

O. K. As to form
(Signed) JOHN F. MURPHY,
(Signed) ROBERT H. EVANS,
Attorneys for Defendant in Error.

[Endorsed:] Bond on Writ of Error Returnable in the Supreme Court of the United States. Filed Nov. 26, 1913. (Signed) F. D. Monckton Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

87 11. Original Citation on Writ of Error.

(Signed) LIVINGSTON B. STEDMAN,
(Signed) EDWARD JUDD,
(Signed) S. S. LANGLAND.
Counsel for Plaintiff in Error.

Received a copy of the foregoing præcipe this 1st day of December, 1913.

(Signed) JOHN S. MURPHY,
(Signed) ROBERT H. EVANS,
Counsel for Defendant in Error.

[Endorsed:] Præcipe for Transcript of Record on Return to Writ of Error from the Supreme Court of the United States. Filed Dec. 4, 1913. (Signed) F. D. Monckton, Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

88 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2163.

THOMAS CHRISTIANSON, Plaintiff in Error,
vs.
THE COUNTY OF KING, Defendant in Error.

Præcipe for Transcript of Record on Return to Writ of Error from the Supreme Court of the United States.

To the Clerk of said Court.

SIR: Please issue a certified Transcript of the Record on return to the Writ of Error from the Supreme Court of the United States in the above entitled cause, consisting of the following:

1. Copy of Printed Transcript of Record as printed in said Circuit Court of Appeals;
2. Order of Submission;
3. Opinion;
4. Judgment;

5. Petition for Allowance of Writ of Error and Order Allowing Writ of Error and Fixing Amount of Bond;
6. Assignment of Errors;
7. Bond on Writ of Error;
8. Præcipe for Transcript of Record on Return to said Writ of Error;
9. Certificate to said Transcript of Record on Return to said Writ of Error;
10. Original Writ of Error; and

89 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2163.

THOMAS CHRISTIANSON, Plaintiff in Error,
vs.
THE COUNTY OF KING, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Return to Writ of Error from the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty-eight (88) pages, numbered from and including one (1) to and including eighty-eight (88) to be a true copy of the complete record in the above-entitled cause, prepared pursuant to Præcipe therefor filed by counsel for the Plaintiff in Error, including all proceedings had therein, and including the Opinion and the Assignment of Errors filed therein as the same remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record in said cause on return to the annexed Writ of Error from the Supreme Court of the United States.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this second day of January, A. D. 1914.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

90 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between Thomas Christianson, Plaintiff in Error, and The County of King, Defendant in Error, a manifest error hath happened, to the great damage of the said Plaintiff in Error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court in the City of Washington, in the District of Columbia, within sixty days from the date hereof, to be then and there held, that, the record and the proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, the twenty-sixth day of November, in the year of our Lord One Thousand, Nine Hundred and Thirteen.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed by
WM. W. MORROW,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

91 *Return to Writ of Error.*

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit to the Within Writ of Error.

As within we are commanded, we certify under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the twenty-sixth day of November, A. D. 1913, duly lodged in the cause in this Court for the within named defendant in error.

By the Court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed:] Docketed. No. 2163. United States Circuit Court of Appeals for the Ninth Circuit. Thomas Christianson, Plaintiff in Error, vs. The County of King, Defendant in Error. Writ of Error Returnable in Supreme Court U. S. Original. Due service

of the within Writ of Error, and receipt of a copy thereof, is hereby admitted this First day of Dec. A. D. 1913. John F. Murphy, Robert H. Evans, Counsel for Defendant in Error. Filed Dec. 4, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

92 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the County of King and to John F. Murphy and Robert H. Evans, its Attorneys, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the City of Washington, in the District of Columbia, within sixty (60) days from the date hereof, pursuant to a writ of error duly issued by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, wherein Thomas Christianson is plaintiff in error, and you the said County of King are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William W. Morrow, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this twenty-sixth day of November, in the year of our Lord, One Thousand Nine Hundred and Thirteen.

WM. W. MORROW,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

93 [Endorsed:] Docketed. No. 2163. United States Circuit Court of Appeals for the Ninth Circuit. Thomas Christianson, Plaintiff in Error, vs. The County of King, Defendant in Error. Citation on Writ of Error Returnable in Supreme Court U. S. Original. Due service of the within Citation on Writ of Error, and receipt of a copy thereof, is hereby admitted this First day of December, A. D. 1913. John F. Murphy, Robert H. Evans, Counsel for the Defendant in Error. Filed Dec. 4, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Endorsed on cover: File No. 24,049. U. S. Circuit Court Appeals, 9th Circuit. Term No. 356. Thomas Christianson, plaintiff in error, vs. The County of King. Filed February 9th, 1914. File No. 24,049.

INDEX

In the Supreme Court of the United States

OCTOBER TERM, 1914.

THOMAS CHRISTIANSON,
Plaintiff in Error.
vs.
THE COUNTY OF KING,
Defendant in Error.

No. 356

ERROR TO THE CIRCUIT COURT OF APPEALS, OF THE NINTH CIRCUIT.

Brief for Plaintiff in Error

TO THE HONORABLE JUSTICES OF SAID SUPREME COURT:

This is an action of ejectment brought to recover possession of certain lands in the valley of the Duwamish River, but now within the city limits of the city of Seattle, in King County, Washington. The original tract contained 160 acres. The defend-

ant has had control of the same since 1869. The present status of the property is, that the defendant is using a portion of the tract in connection with its county hospital, which portion is known as the "King County Hospital Grounds;" it is using a portion as a poor farm, which portion is known as the "King County Farm;" it has subdivided a portion, calling it the "King County Addition to Seattle," and has sold off the bulk of that addition in lots; it has subdivided another portion, calling it "King County Second Addition to Seattle," and has sold off a considerable part of that addition in lots; and the original tract is now traversed by many highways and railroad rights of way. The plaintiff is not seeking to disturb the public or railroad easements acquired in the property, nor the lots sold to innocent purchasers by the defendant. It is only sought to recover the King County Hospital Grounds, the King County Farm, and such lots as are unsold in the King County Additions. The plaintiff also concedes that the defendant may retain as betterments, the valuable buildings put by defendant upon the King County Hospital Grounds.

The amended demurrer to the amended complaint was sustained by the District Court and judgment of dismissal and for costs entered against the

plaintiff; this judgment was affirmed by the Circuit Court of Appeals, Ninth Circuit, and the latter decision is brought by writ of error to this court for review. Consequently the whole case is stated in the amended complaint, which, shorn of superfluous verbiage, alleges as follows:

I.

That plaintiff is a subject of the king of Norway.

II.

That defendant is a municipal corporation of the state of Washington.

III.

That the property in dispute exceeds in value $300,000.

That the case involves the following grounds of federal jurisdiction:

1. Diversity of citizenship of plaintiff and defendant.

2. The construction of Amendment V. of U. S. Constitution inhibiting the taking of private property for public use without just compensation.

3. The construction of Amendments V. and

XIV. of U. S. Constitution, inhibiting the deprivation of property without due process of law.

4. The construction of Sec. 1907, Rev. Stat. U. S. 1874, creating the courts of Washington Territory.

5. The construction of Sec. 1851, Rev. Stat. U. S. 1874, vesting the legislative powers of Washington Territory.

6. The construction of Sec. 1924, Rev. Stat. U. S. 1874, restricting the legislative powers of Washington Territory.

IV.

That in March, 1865, Lars Torgerson died, intestate, being a resident of King County, Washington Territory, and being commonly known by the name of John Thompson.

V.

That prior to his death Lars Torgerson, under the name of John Thompson, acquired title in fee to the 160 acres in question, by deed from Joseph Williamson and William Greenfield. That Williamson and Greenfield acquired title to said land by deed from Luther M. Collins. That Collins acquired title

to said land by patent from the United States. That all said conveyances were duly recorded.

VI.

That the heirs of Lars Torgerson were two brothers, one sister and the children of a deceased sister, all Norwegian subjects. That plaintiff is a son of one of the sisters. That all other heirs have conveyed their interests in said land to plaintiff by deed, and he is now sole owner in fee of said land.

VII.

That Lars Torgerson was born at Porsgund, Norway, Aug. 30, 1829. That at the age of 21 he shipped as a sailor, and went by way of England to Australia, and thence in 1856 to San Francisco. That at that port he deserted his ship on account of abuse, changed his name to John Thompson to avoid arrest for desertion, came to Elliott Bay neighborhood, and resided until his death in 1865 in Kitsap and King Counties in Washington Territory.

VIII.

That the heirs of Lars Torgerson only learned of his death, of the place thereof, and of his change of name within the last three years. That since learning of the same they have been diligent in col-

lecting proofs of the identity of Lars Torgerson and John Thompson, and of their relationship to him.

IX.

That March 26, 1865, there was filed in the Probate Court of King County, Washington Territory, the following document:

"Petition to the Honorable Probate Court:

I would most respectfully ask to have Mr. Daniel Bagley appointed administrator of the estate of John Thompson, deceased.

Dated March 11, 1865. H. L. Yesler
J. Williamson."

That said document was the only one purporting to be a petition for the appointment of an administrator of the estate of John Thompson ever filed in said court.

That thereupon said court entered the following order:

"Whereas, John Thompson, of the County aforesaid, on the —— day of March, 1865, died intestate, leaving at the time of his death property subject to administration,

"Now, therefore, know all men by these presents, that I do therefore appoint Daniel Bagley administrator upon said estate, and authorize him to administer the same according to law.

Dated March 26, 1865. Thomas Mercer,
Probate Judge."

That said order was the only one ever entered in said court purporting to appoint an administrator of the estate of John Thompson.

That May 26, 1868, the County Commissioners of King County, Washington Territory, filed in said probate court a petition, stating they were informed that Thompson's administrator had a large sum of money in his hands; that no heirs had appeared to claim the same; that they believed no heirs were known to exist; that King County was entitled to the balance in the administrator's hands; and praying an order requiring Bagley to account and pay the balance in his hands to the Treasurer of said King County.

That on the day the last described petition was filed there was issued a citation by said court, reciting the contents of said petition, and commanding the administrator to show cause why the orders asked for should not be entered; which citation was served on said administrator on the next day, May 27, 1968.

That July 27, 1868, Bagley filed a report, referring to the said citation; stating that he had been earnestly requested by the countrymen of John Thompson to keep matters in his hands until he could ascertain the whereabouts of the heirs, as

they were well assured that heirs were living in Sweden; and asking a continuance until the next term, when if no word was had from the heirs he would turn over the property in his hands to King County, and make a final report.

That Oct. 29, 1868, John J. McGilvra, filed in said court, an affidavit in which he states that he was employed as an attorney by the King County Commissioners, to place the Thompson "estate in such a position that said county to whom said estate by law escheats, may have the full benefit thereof," and asking for the vacation of some order entered at the previous term.

That Feb. 10, 1869, a petition was filed in said court by King County, asking for a removal of Bagley as administrator on various grounds.

That Feb. 12, 1869, Bagley filed his petition, reciting that his final account as administrator had been approved; that the debts of the estate had been paid; that no heirs of John Thompson have been found; and praying he might be discharged, "and that after due notice given and proceedings had, the estate remaining in his hands, as petitioner aforesaid, may be turned over to King County, Washington Territory; or such other or further order made as may be meet in the premises."

That March 29, 1869, an order was entered by said court repeating the recitals of the last described petition of Bagley, and commanding "that all persons interested in the estate of the said John Thompson, deceased, be and appear" before the court, on April 26, 1869, "then and there to show cause why an order of distribution should not be made of the residue of said estate among the heirs of said deceased according to law." That said order was duly published four weeks from April 5, to April 26, 1869, both inclusive.

That May 26, 1869, an order of distribution was entered in said Thompson estate, repeating the recitals of the petition for distribution; reciting a continuance from the day first set by the order published; reciting that the inventory and appraisement, final account, and notice to creditors were all in due form; reciting that the estate had been fully administered and all debts paid; reciting "that said decedent died intestate in the County of King, Washington Territory on the —— day of March, 1865, leaving no heirs surviving him;" reciting "there being no heirs of decedent, that the entire estate escheat to the County of King in Washington Territory." That said decree then proceeds as follows:

"It is hereby ordered, adjudged and decreed that all the acts and proceedings of said administrator, as reported by this court, and as appearing upon the records thereof, be and the same are hereby approved and confirmed; and that after deducting the estimated expenses of closing the administration, the residue of said estate of John Thompson, deceased, not heretofore distributed, hereinafter particularly described, and now remaining in the hands of said administrator and any other property not known or discovered which may belong to the said estate, or in which the said estate may have any interest, be and the same is hereby distributed as follows, to-wit: The entire estate to the county of King in Washington Territory."

That said decree then proceeds to discharge the administrator from his trust. That the said decree then closes in the following language:

"The following is a particular description of the said residue of said estate referred to in this decree, and of which distribution is ordered, adjudged and decreed, to-wit:

1st. Cash to-wit: $343.83 gold coin.

2nd. And Real Estate, to-wit: One hundred and sixty acres of land on Duwamish River in King County, W. T. more particularly described in a certain deed from Joseph Williamson and William Greenfield to John Thompson dated January 19th, A. D. 1865, and recorded in Volume 1 of Records of King County, W. T., on Pages 458, 459 and 460.

3rd. A Lease of said land to John Martin, dated March 5th, 1866, on which the entire rent reserved remains due and unpaid."

That said decree is null and void; that said probate court was wholly without jurisdiction to vest, transfer, convey, fix or pass upon the title to said land and had no power or authority to declare the same escheated.

That all of defendant's claims to said land, acts done in reference to said land, and control exercised over said land have been under and by virtue of said null and void decree.

That the defendant has not, and never has had any contract, deed, conveyance, decree, judgment, nor any other writing, record or document evidencing or purporting to evidence any title on its part in or to said land.

That neither the defendant, nor any other public officer or authority has ever instituted any suit or legal proceeding to escheat said land.

That neither the defendant, nor any other public officer or authority has ever instituted any suit or legal proceeding to have any title the defendant might have in said land quieted or confirmed.

X.

That since the entry of said decree of distribution said land has been marked on the county as-

sessor's rolls as exempt from taxation as county property.

That about 1885 the territorial County of King occupied a certain portion of said land generally known as the "King County Farm," and since the organization of the State of Washington the defendant has succeeded to such occupancy; that the same has not been used for any county purposes, but has been let out to tenants for the purpose of producing a monetary income for the defendant.

That about the year 1900 the defendant occupied a portion of said land generally known as the "King County Hospital Grounds," and has since been using the same for county hospital purposes, having placed thereon a valuable hospital building with its appurtenances.

That in 1892 the defendant subdivided a portion of said land calling the same the "King County Addition to Seattle," and has sold off all of the same to private parties, except 13 lots in said addition.

That in 1903 the defendant subdivided a portion of said land calling the same "King County Second Addition to the City of Seattle," and has sold off about half of the same to private parties.

XI.

That the King County Farm, King County Hospital Grounds and two King County Additions together constitute the tract of 160 acres which was the property of Lars Torgerson; but a number of highways and railroad rights of way now cross the same.

XII.

That the plaintiff is entitled to all betterments placed upon said land prior to 1903, but hereby expressly waives all claim to the same, and admits that the defendants may be re-imbursed for the same under the law, in the same manner as if the same had been made on said land since 1903.

PRAYS that plaintiff may recover possession of land composing the King County Farm, the King County Hospital Grounds, and the unsold portions of the King County Additions still in the control of the defendant; and for the costs of suit.

THE AMENDED DEMURRER states six grounds as follows:

"1. That the plaintiff has no legal capacity to maintain this action.

"2. That the said complaint does not state facts sufficient to constitute a cause of action against the defendant.

"3. That said action has not been commenced within the time limited by law therefor.

"4. That said complaint shows upon its face that the plaintiff has been guilty of laches and of procrastination in the bringing of said action.

"5. That the Court has no jurisdiction over the person of defendant, or over the subject matter of said action.

"6. That plaintiff's complaint shows that plaintiff by his own acts, deeds and omissions, is now estopped from bringing and maintaining this action or from asserting any right, title or interest in and to the property described in said complaint."

The grounds of (1) "No capacity of plaintiff to sue," and (5) "No jurisdiction of court over person or subject matter," are certainly not stated seriously.

The ground of (2) "General demurrer," almost comes in the same category, because as the plaintiff deraigns a good title in fee from the United States Government, and alleges that the defendant is in possession of the land in question without any claim of title save under a void order of court, certainly he states a good cause of action in ejectment.

The foregoing grounds were not discussed in the courts below, and we shall assume they are not going to be in this court. This only leaves three grounds of demurrer to be considered, which are, (3) "The Statute of Limitations;" (4) "Laches," and (6) "Estoppel."

ASSIGNMENT OF ERRORS.

1. The Court erred in affirming the judgment of the District Court.

2. The Court erred in not reversing the judgment of the District Court and remanding the cause for further proceedings.

3. The Court erred in holding that the Territorial Probate Court had jurisdiction of the subject matter of escheating the Thompson estate.

4. The Court erred in holding that the Territorial Probate Court acquired jurisdiction over the heirs of Thompson.

5. The Court erred in holding that the Territorial Probate Court had authority to distribute the residue of the Thompson estate to King County.

6. The Court erred in holding the plaintiff's cause of action barred by the statute of limitations.

7. The Court erred in not holding that the County of King acquired no title to the land in controversy by escheat.

8. The Court erred in not holding that the proceedings of the Territorial Probate Court were an absolute nullity.

9. The Court erred in not holding that escheated property in Washington Territory would belong to the United States.

10. The Court erred in not holding that the acts of the defendant were the taking of private property for public use without just compensation.

11. The Court erred in not holding that the proceedings in the Territorial Probate Court distributing the Thompson estate were not due process of law.

12. The Court erred in not holding that the Territorial Probate Court did not have power to distribute the land in question, because no such power was conferred upon it by the Act of Congress creating the Courts of Washington Territory.

13. The Court erred in not holding that the Act of the Washington Territorial Legislature as-

suming to give escheated property to the Territorial Counties was an interference with the primary disposal of the soil by the United States in contravention to the Act of Congress vesting legislative power in the Territory of Washington.

14. The Court erred in not holding that chapter 14 of the Probate Act of Washington Territory, enacted in 1860, was void, because it was outside of the scope of the title of the Act, contrary to the Act of Congress restricting the legislative powers of Washington Territory.

ARGUMENT.

I.

NO FACTS ON WHICH TO BASE LACHES AND ESTOPPEL ARE SHOWN IN THE COMPLAINT, NOR COULD THEY BE SET UP AS DEFENSES TO THIS ACTION.

(A) We take the liberty of citing to the Court the following recognized definitions of Laches and Estoppel:

"LACHES is a neglect to do what in the law should have been done for an unreasonable or un-

explained length of time under circumstances permitting diligence."

24 Cyc., p. 840.

"ESTOPPEL is, where one voluntarily, by his words or conduct, caused another to believe the existence of a certain state of things, and induced him to act on that belief, so as to alter his previous condition for the worse, in that case the former is concluded from averring against the latter a different state of things as existing at the same time."

Fetter, on Equity.

ESTOPPEL BY SILENCE: "To make the silence of a party operate as an estoppel the circumstances must have been such as to render it his duty to speak. It is essential that he should have had knowledge of the facts, and that the adverse party should have been ignorant of the truth, and have been misled into doing that which he would not have done but for such silence. In other words, when the silence is of such a character and under such circumstances that it would become a fraud upon the other party to permit the party who has kept silent to deny what his silence has induced the other to believe and act upon it will act as an estoppel."

16 Cyc., p. 759.

FAILURE TO ASSERT TITLE OR RIGHT: "Where a person stands by and sees another about to commit or in the course of committing an act infringing upon his right and fails to assert his title or right, he will be estopped afterward to assert it; but it must appear that it was his duty to speak,

and that his silence or passive conduct actually misled the other to his prejudice."

16 Cyc., p. 761.

The facts shown in the complaint can not possibly bring this case within any of these definitions. Laches and estoppel are one and the same in principle, the only difference being that the former is based on acts of omission, and the latter on acts of commission. The heirs of Lars Torgerson knew absolutely nothing of the facts out of which this case arises, until within three years last past. The defendant knew all about the facts, even to the point of knowing that Torgerson had heirs somewhere in those countries composing Scandinavia. The heirs of Torgerson never did anything on which the defendant based any of its acts, because they did not come in contact with the defendant and did not know of its existence. The defendant did know there were such persons as the heirs, and attempted to appropriate their property without their knowledge. If there is any wrongdoing shown here, it is on the part of the defendant. We could cite the court to almost innumerable cases, but will cite only one, because of its resemblance to the case at bar, in lack of knowledge on the part of the plaintiff, and

in the fact that it was a county trying to appropriate property that did not belong to it.

In *Young vs. Board of Commissioners*, 51 Fed. Rep. 585, a suit was brought in ejectment to recover possession of certain land which had been dedicated as a cemetery by the father of the plaintiff. The plaintiff had been away from the city in which the land was located for 40 years, and upon his return found that the cemetery use had been abandoned, and that for ten years before his return a county court house had been standing on the land. Taft, Judge, in his opinion, says:

"This is an action at law. The form of procedure is under the code of Ohio, but the remedy is substantially that of ejectment at common law. Plaintiff must recover, if at all, on his title as it is. If equitable remedies are needed to perfect his right to possession, he fails. In like manner, only defenses at law are available here. The defense of estoppel *in pais*, pleaded in the answer, would seem to be of equitable cognizance, and hardly to be urged or considered here. However that might be, if it were a valid plea, there is no evidence to support it, because the court house was erected 10 years before the plaintiff (who was not in Youngstown from 1848 to 1888) knew anything of the abandonment of the burying ground or its subsequent use for general county purposes."

In the case at bar there is absolutely nothing in the complaint to render applicable the principles of Laches or Estoppel.

(B) But even if this complaint did show grounds for the application of the equitable doctrines of laches and estoppel, they could not be utilized as defenses to this legal action of ejectment. Whatever may be allowable under the code of Washington, as to pleading equitable defenses to actions at law, it can not be done in the federal courts.

"The difference between causes of action at law and in equity is matter of substance, and not of form. In the national courts the ineradicable distinction between them is sedulously preserved in the forms and practice available for their maintenance as it is in the nature of the causes themselves and in the principles on which they rest. A legal cause of action may not be sustained in equity, because there is an adequate remedy for the wrong it presents at law, and it is only where there is no such remedy that a suit in equity can be maintained. Equitable causes and defenses are not available in actions at law, because they invoke the judgment and appeal to the conscience of the chancellor, and the free exercise of that judgment and conscience is forbidden in actions at law by the rule which entitles either party to a trial of all the issues of fact by a jury. In the federal courts an action at law cannot be maintained in equity, nor is an equitable cause of action or an equitable defense available at law. *Bagnell v. Broderick*, 13 Pct. 436, 10 L. Ed. 235; *Foster v. Mora*, 98 U. U. 425, 428, 25 L. Ed. 191; *Scott v. Armstrong*, 146 U. S. 499, 512, 13 Sup. Ct. 148, 36 L. Ed. 1059; *Linsay v. Bank*, 156 U. S. 485, 493, 15 Sup. Ct. 472, 39, L. Ed. 505; *Schoolfield v. Rhodes*, 82 Fed. 153, 155, 27 c. c. a. 95, 97; *Davis v. Davis*, 72 Fed. 81, 83, 18 C. C. A. 438, 440."

Highland Boy G. M. Co. vs. Strickley, 116 Fed. 852.

To like effect are:

City of New Orleans vs. L. Construction Co., 139 U. S. 45;

Robinson vs. Campbell, 3 Wheat. 212;

Doe vs. Aiken, 31 Fed. 393-395;

Hickey vs. Stewart, 3 How. 750-759;

Singleton vs. Tanchard, 1 Black 342;

Newman vs. Jackson, 12 Wheat. 570-572;

Burnes vs. Scott, 117 U. S. 582-587.

This we believe disposes of the questions of laches and estoppel as far as the case at bar is concerned.

II.

THE TERRITORIAL COUNTY OF KING, TO WHOSE TITLE, IF ANY, THE DEFENDANT SUCCEEDS, NEVER ACQUIRED ANY TITLE TO THE LAND IN QUESTION BY ESCHEAT.

By virtue of certain provisions of the Constitution of Washington, the defendant succeeded to

all rights of the County of King, of Washington Territory; which it is unnecessary to cite, unless this statement should be challenged. Lars Torgerson, then passing under the name of John Thompson, died in March, 1865. The County of King (a Territorial Municipality) laid claim to his estate in the Territorial Probate Court which was administering the same and that Court entered an order assuming to give it to the County, and that County, and its successor, the defendant, have retained control of the land involved ever since. There was at the time of Thompson's (by which name we will call him, now that we must discuss the probate records in which he is so designated) death a law in the territory assuming to give escheated lands to the county in which they were located. The county claimed the land under this law. We insist that said land never escheated to the County of King for the following reasons:

A. The Territory was not a Sovereign, but a municipal corporation.

B. The Organic Law of the Territory conveyed to it no property rights of the United States.

C. The territorial legislative act giving escheated property to the counties trenched upon the

primary disposal of the soil in a manner forbidden by the Organic Law.

D. The territorial legislative act giving escheated property to the counties was invalid under the Organic Law because its title was not broad enough to cover the subject matter.

E. There was never any Office Found.

A.

THE TERRITORY WAS NOT A SOVEREIGN BUT A MUNICIPAL CORPORATION.

Kent's definition of escheat (4 Com. 423) is:

"When the blood of the last person seized became extinct, and the title of the tenant in fee failed, from want of heirs, or by some other means, the land resulted back, or reverted to the original grantor, or the lord of the fee, from whom it proceeded, or to his descendants or successors."

The Territory never owned this land, and so it could not revert to it as the original grantor from whom the title proceeded. It could not take it as lord of the fee or sovereign, because it was not a sovereign. There have been many definitions given of a territory, but they all resolve themselves down to a statement, that a territory is a sub-government established to assist the sovereign in ad-

ministering the government; or to use the common designation of such a sub-government, a municipal corporation.

The United States was the original owner of the soil *in allodium*, and also the Sovereign. It comes within both of the descriptions in the definition of the person who should take in case of escheat.

Under our system of government all property that escheats in a territory, goes to the United States.

This is a most important question in this case because if this Court finds that we are right in that escheated property passed to the United States in the Territory of Washington, that one point is absolutely decisive of this case, without taking into consideration all the other good and valid reasons that we shall give. This is so because if the County was not entitled to escheated property, all the court proceedings shown in this case are an absolute nullity, and also the county is without any claim of right or color of title on which to base an invocation of the statute of limitations. The importance of this question is our justification for presenting to the court all the adjudications thereon, together with a rather lengthy analysis of the same.

This question was first passed upon by the Supreme Court of Tennessee, in 1827, in the case of *Williams vs. Wilson, Martin & Yerger*, 248. The United States came into existence as a sovereign power under the constitution in April, 1789. In December, 1789, North Carolina ceded to the United States the territory which it claimed to own west of the Allegheny Mountains, which cession was accepted by Congress in April, 1790, and the Territory of Tennessee formed therefrom. The land in dispute was acquired by one, Johnston, an alien, during territorial days and he died, still an alien, before the organization of the State of Tennessee. In commenting on this situation, the court says:

"All lands which might escheat after the Cession Act would, of course, escheat to the sovereign power, the government of the United States, until the formation of our Constitution, and afterwards to this government."

So elementary were the principles involved that the court did not deem discussion necessary, but speaks of the holding as a matter "of course."

The question next came up for consideration by the Supreme Court of Alabama, in 1851, in *Etheridge vs. Doe*, 18 Ala. 565. In 1802 Georgia ceded to the United States the territory which it

claimed to own west of the Allegheny Mountains, and from this was formed the Territory of Alabama. In territorial days one Vanner, an alien, acquired the land in dispute from the United States by patent. In 1819 the State of Alabama was organized, and in 1821 Vanner died, still an alien. It was contended on one side that the property escheated to the United States as original grantor of the land, and on the other side that it escheated to the State of Alabama as sovereign. The court held that the claim of the sovereign was paramount. In analyzing this question the court says:

"Anterior to the period when Alabama was admitted as a State, and while the U. S. Government exercised jurisdiction over this country as a territory, escheated lands would have belonged to the United States. See *Williams vs. Wilson, Mart. & Y.* 248, but it is clear that after the admission of Alabama into the Union, such lands must necessarily vest in the State, as the Sovereign within whose territory they escheat."

Again, in 1874, this question was presented to the Supreme Court of Montana, to be passed upon, in *Territory vs. Lee*, 2 Mont. 124. The Territorial Assembly, in 1872, had passed "An Act to provide for the forfeiture to the Territory of placer mines held by aliens," which declared such forfeiture and

provided a procedure for enforcing the same. Chief Justice Wade, in the course of an exhaustive opinion, says:

"Does the Territory of Montana possess the inherent sovereign power necessary to enable it to cause the forfeiture to itself of the property of aliens, situate within its territorial limits? And does it possess the power to forfeit to its own use and benefit property that never belonged to the Territory, in which the Territory never had any interest, the title to which still remains in the United States, subject only to a possessory easement acquired by individuals, by leave and license granted by the general government? In other words, can the Territory forfeit to its own use, and thereby become the owner of property which the government, in its liberality, granted only to citizens and to those who have declared their intention to become such? *And if there is a forfeiture of this possessory title which the government has granted to individuals, does not the property forfeited necessarily revert back to the general government, the original grantor?* The solution of these questions necessarily leads to a discussion of the sovereignty of a Territory under the constitution and government of the United States. Before entering upon this subject, however, we wish to premise by saying that primarily the general government is the owner of all the soil within its Territorial limits, and that it is the fountain and source from whence all title to the soil is acquired, and that by reason of this fact, the right of forfeiture vests in the sovereign power of the general government; and the particular inquiry now is: Are the organized Territories belonging to the United States clothed with this sovereign power?"

"The authority to enact laws of forfeiture is a sov-

ereign prerogative, and belongs only to the supreme power of a nation. Is this sovereign power lodged in the Territory of Montana?"

The court then calls attention to the fact that the Territories were created by acts of Congress in the exercise of the power conferred upon it by the constitution, "to dispose of and make all needful rules and regulations respecting the territory, or other property belonging to the United States," and describes them as follows:

"The governments thus established were and are temporary in their character, and only designed to subserve a temporary purpose. These governments were and now are, and at all times have been, under the complete control of Congress, and subject to abolition, modification or change, at the behest of the power which created them, and the laws enacted by the territorial legislatures are alike subject to modification or repeal by the action of Congress. These inherent infirmities in the governments, and legislative enactments of the territories, at once rob them of all the essential attributes of sovereignty, and make them provinces over whom the United States exercises supreme control."

The learned judge then goes on to point out in detail that the legislative, judicial and executive branches of the territorial governments are none of them paramount, but all subject to federal control, and thus demonstrates that they are simply subsidiary instrumentalities created for local adminis-

rative purposes, or what is more commonly known as "municipal corporations." Then reverting to the main question the court says:

"The Territory had no interest whatever in the claims, held by aliens or by any other persons, and no title or shadow of title thereto, but by the operation of this statute the Territory becomes the owner of the possessory title which is or may be the entire equitable interest, and is authorized to sell the same for its own use, so that, by the force of this statute, it becomes the owner of property in which it never had any interest, and which never belonged to it, and it forfeits the property of an alien and calls it its own, while *if any forfeiture takes place for any reason whatever, the property thus forfeited necessarily belongs to the United States.* The territory cannot acquire title to property that does not and never did belong to it, so easily as this.

There might be reason and plausibility in a statute of this kind, providing the Territory was clothed with sovereign power, and owned the paramount title to the property sought to be confiscated, but in the absence of sovereignty and in the absence of any title or interest in the property, and while the general government is yet the owner of the legal title, and while, *if any interest in the property is forfeited, it naturally and rightfully reverts to the sovereign, the general government,* who holds the paramount title to all the property within its limits, it certainly is an unwarranted exercise of power for the temporary government of a Territory to undertake, by forfeiture, to convert to its own use property, which, *if subject to forfeiture at all, should be forfeited to the government of the United States.*"

In the Courts below, it was sought to differentiate this case because the property sought to be escheated was in the nature of easements. This is a captious criticism because it makes no difference whether the property forfeited is personal or real, and if real, it makes no difference what is the estate which is held in the realty. All are property, and the law of escheat applies equally to all when the title of the owner thereof fails or is determined, and there is nobody who can legally take in succession to him..

In 1890 this Court, in *Church of Jesus Christ of Latter Day Saints vs. United States*, 136 U. S. 1, usually referred to as the "Mormon Church Case," emphatically and clearly enunciate the law, that property which escheats or is forfeited in a Territory goes to the United States.

Congress had passed an act which declared the charter of the Mormon Church Corporation annulled, and directed proceedings to be brought to escheat or forfeit its property, and provided that such property as was escheated should be sold and the proceeds applied to the use of the common schools of Utah Territory. This Court upheld this act and all proceedings thereunder, from every

point of view, constitutional or otherwise. In speaking of what would become, upon dissolution, of the property of a public or charitable corporation (which the Court held the Mormon Church Corporation to be) the Court says:

"As to these the ancient and established rule prevails, namely: that when a corporation is dissolved, its personal property, *like that of a man dying without heirs*, ceases to be the subject of private ownership, and becomes subject to the disposal of the sovereign authority; while its real estate reverts or escheats to the grantor or donor, unless some other course of devolution has been directed by positive law, though still subject, as we shall hereafter see, to the charitable use. To this rule the corporation in question was undoubtedly subject. But the grantor of all, or the principal part, of the real estate of the Church of Jesus Christ of Latter Day Saints was really the United States, from whom the property was derived by the church or its trustees, through the operation of the Town Site Act." "There can be no doubt, therefore, that the real estate of the Corporation in question could not, on its dissolution, revert or pass to any other person or persons than the United States."

Further extracts are unnecessary. Counsel for the Church seem to have challenged the right of the United States to escheat the property at all, but throughout the whole report of the case, covering 68 pages, no one seems to have thought of questioning that the United States was the proper person

and authority to escheat the property and claim its ownership after escheat.

We do not understand why, in the case at bar, the Circuit Court of Appeals, in its opinion should have totally disregarded the foregoing explicit decision of this Court, concurred in by all Courts of last resort which had been called upon to consider the question, and held the opposite (trans. 51), basing its opinion upon cases which when properly analyzed do not sustain their holding, but substantiate our contention.

The first case referred to is a decision of the Supreme Court of Michigan, *Crane vs. Reeder*, 21 Mich. 24, in which are found sentences and remarks which would seem to militate against the position for which we contend, and which hold that escheats which occurred in the territory composing the State of Michigan before that state existed became subsequently the property of the state.

What it decides is good law, but it has no application to the law of the territory of Washington. In treating of the subject of escheat there arises the question of sovereignty. Under our system of government there is in reality no sovereign (*Chisholm vs. Georgia*, 2 *Dallas*, 419), but this sys-

tem which we have inherited from our ancestors is of such a nature that certain functions of government which were formerly exercised by the sovereign and certain property rights which formerly belonged to the sovereign must be vested in some public authority. So the courts have by construction devolved such duties and rights upon that officer or branch of the government whose functions most nearly, under our system, resembled those of the British sovereign under the common law. The principles of international law in respect to sovereignty also frequently are involved in the case. As the different territories of the United States have been acquired in different manners, the method of their acquirement cuts a very important figure, and no one can judge of what is the proper construction to be put upon the law unless familiar with the history of the acquirement of such territory.

The Territory of Virginia Northwest of the Ohio River, subsequently becoming the States of Ohio, Indiana, Illinois, Michigan and Wisconsin, is the one whose powers and rights as to escheats were under examination in *Crane vs. Reeder.*

We will now state as succinctly as we can the history of the "Old Northwest Territory," and then when this Michigan case is read in the light of that

history it will have an entirely different aspect than it would appear to have from disjointed extracts from the opinion. It will transpire that it not only is not inconsistent with our contention, but in principle, exactly coincides therewith.

The Colony of Virginia comprised that territory which is now the states of Virginia and West Virginia, and under its crown grants it claimed to be the owner of the territory northwest of the Ohio river extending to the Great Lakes and the Mississippi river. At the end of the Revolutionary War there was a dispute as to whether the United States or Great Britain was entitled to this region, both claiming it. During the first negotiations for peace nothing had been mentioned in reference to this subject, and so in the final settlement it was necessary to appeal to international law. It is a principle of international law that when a peace is concluded all debatable territory which has not been made the subject matter of express agreement belongs to that one of the belligerents who is in military possession thereof at the time hostilities ceased. Not long before the close of the Revolutionary War, Gen. George Rogers Clarke, leading a body of American frontiersmen backed by Indian allies, had captured the military post at Kaskaskia (aft-

erwards the capital of Illinois), on the Mississippi river, and then during the winter made a forced march across what is now the state of Illinois, and captured Fort St. Vincents (now Vincennes, Ind.), on the Wabash river. He was acting in the name of the State of Virginia. Fort St. Vincents was the leading military post in the Northwest Territory, and so at the conclusion of the Revolutionary War the flag of the State of Virginia was flying over that fort, and Great Britain was compelled to acknowledge that such territory was in the military possession of the United States. This incident is referred to in the Act of Cession of Virginia, when it provided "that a quantity not exceeding 150,000 acres of land, promised by this State, shall be allowed and granted to the then Colonel, now General George Rogers Clarke, and to the officers and soldiers of his regiment, who marched with him when the posts of Kaskaskies and St. Vincents were reduced." Of course under these circumstances the title of the state of Virginia to said Northwest Territory was beyond dispute as far as the other states of the then confederation were concerned. However, the state of Virginia magnanimously made a present of this territory to the Confederation by an act passed December 20, 1783, directing its dele-

gates in Congress to deed the same to the United States. In pursuance of such directions, on March 1, 1784, Thomas Jefferson, James Monroe, S. Hardy and Arthur Lee, the Virginia delegates in the Continental Congress, made a deed of such territory to the Confederation. On July 13, 1878, one month before the United States Constitutional Convention met, and almost two years before the constitution went into effect, the Continental Congress enacted "An Ordinance for the government of the territory of the United States Northwest of the river Ohio."

(This Deed of Cession and Ordinance and all acts of Congress and of the State of Virginia in reference to this subject matter will be found in the beginning of either Hurd's Rev. Stat. of Ill. or Starr & Curtiss Ann. Stat. of Ill. following the Constitution of the U. S. and preceding the State Constitutions.)

From this Northwest Territory have been created the present states of Ohio (except a small portion of the northeast corner thereof, known as the Western Reserve of Connecticut), Indiana, Illinois, Michigan and Wisconsin.

In the case of *Crane vs. Reeder* which we are discussing, the Supreme Court of Michigan had before it the problem of ascertaining upon whom

devolved the right of sovereignty in the Northwest Territory to such an extent and in such a manner that such person or government would take escheated property. The state of Virginia had completely parted with its title and control of the land to the Confederation composed of the states which were originally the 13 Colonies. This Confederation was not a sovereign power. In the articles creating it, it is styled a "Confederacy," and it is stated that "the said states hereby severally enter into a formal league of friendship with each other for their common defense," etc., and it was declared that "each state retains its sovereignty, freedom and independence." The relation existing between these states was simply an offensive and defensive alliance, by treaty between sovereign powers. Where, then, did the sovereign power lie? The Supreme Court of Michigan in the case under discussion correctly reasons this proposition out as follows:

"The articles of confederation made no provision for the direct legislation of Congress over the local affairs of any part of the country, and such direct government, while possibly it might have been lawful, would have been at variance with the whole theory of local government, which had been acted upon both by states and colonies. The delegation of legislative powers to the territories was practically a necessity, and the ordinance of 1787,

while retaining a right of veto or disapproval of the acts of the governor and judges, provides expressly that such laws as are not disapproved shall only be repealed by the local authority. No one can read the ordinance without perceiving that it was intended to throw the whole regulation of local affairs upon the local government." "Immediately after the government of the United States was organized under the constitution, a brief statute was passed to adapt the ordinance to the constitution—not to change its nature—but, as stated in the preamble, in order that it '*may continue to have full effect.*' And so long as the system should continue, the whole local regulation was clearly delegated to the territory, as it was afterwards to Michigan when separately organized." "The creation of such a government would be at least an equivalent to the erection of a county palatine, and would transfer all necessary sovereign prerogatives. But under this ordinance the territory only differed from a state in holding derivative instead of independent functions, and in being subject to such changes as congress might adopt."

The court then proceeded to analyze the ordinance of 1787, and point out that the law of descents therein provided varied from the common law and was in a number of respects defective; that the ordinance was silent on the question of escheats, and that the governor and judges who were the legislature of the district under the ordinance, would have full power to legislate upon this subject. They did legislate upon this subject in 1818, and again in 1827, giving the escheats to the territory. Then in 1836, congress ratified the constitution of the state

of Michigan which provided that the state should succeed to the rights of the territory of Michigan in this respect. The exact language of the court in this regard is as follows:

"But in regard to escheats the ordinance was entirely silent, and the act passed October 1st, 1818, declaring that they should '*accrue to the territory*,' was not in conflict with the ordinance. The succession act April 12th, 1827, was in this respect identical. The act of congress of June 15, 1836, preliminary to the admission of the state into the Union, accepts, ratifies and confirms the constitution, and the constitution (schedule, section 3) provides that 'all fines, penalties, forfeitures and *escheats* accruing to the territory of Michigan, shall accrue to the use of the state.' We think the state of Michigan became thereby entitled to the premises in controversy."

It will thus be seen that this case of *Crane vs. Reeder* can be correctly summed up to hold that at the time of the organization of the Northwest Territory, the United States was not a sovereign government; that the territorial government created by the ordinance of 1787, was endowed with all the sovereign powers that existed, including the right to escheat property; that such territorial government legislated upon such rights; that when the state of Michigan was admitted into the Union, its constitution expressly provided that the state should succeed to all the rights of the territory of Michigan

in reference to escheats; and that the congress of the United States approved and confirmed this state constitution. There is absolutely not the slightest resemblance between the Northwest Territory and the Territory of Washington. The Northwest Territory was a sovereign power before the United States was, and the Washington Territory was a mere municipality created by the United States.

This court in the Mormon Church case clearly and unequivocally decides that all escheats in a territory revert to the United States. Among the Justices of that court at the time the last mentioned decision was rendered, were Chief Justice Fuller, of Illinois, and Associate Justice Brown, of this very state of Michigan, both of whom came from portions of this Northwest Territory, and were perfectly familiar with the history of its organization, and well knew what the courts had said in regard to the same. In the opinion in that case, special attention is called to the fact that the Northwest Territory differed from all the other territories of the United States as is evidenced by the following language:

"It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, *other than the territory northwest of the Ohio River (which belonged to the United States at*

the adoption of the Constitution) is derived from the treaty-making power and the power to declare and carry on war."

The Circuit Court of Appeals next cites the case of *Territory vs. Klee*, 1 Wash. 183, as sustaining the power of the territorial legislature to enact laws upon the subject of escheats. In this case, instead of so doing, the court does not pass upon the question at all, but evades it, and expresses a doubt whether it is so. The case went off upon another point, as to what county an administration should be taken out in. After disposing of the case upon that question, the court refers to the question we are discussing as follows:

"But we will here state that we are of the opinion that *if the territory is the owner of the land*, the title vested in it immediately on the death of Gilbert, without the aid or intervention of the probate court" And in that case it can recover the possession of the land, like any other owner, by an appropriate action in the proper court."

It will thus be seen that instead of deciding what counsel say it does, the Supreme Court of Washington in this case expresses a doubt as to whether the land would escheat to the territory.

What the court says on this question is a *dictum*, but that *dictum* instead of recognizing the validity of the Washington Territorial Act in refer-

ence to escheats, as stated by the Court of Appeals, does exactly the contrary, and expresses a doubt as to whether "the Territory is the owner of the land" which it was claimed in that case had escheated.

If then there was any escheat at all, it did not pass the title to the Territory or its counties, but there was a reversion to the United States. The County of King and its successor have been squatters on the public domain, and could acquire no title whatever which they can set up against us. We can show a title from the United States which will protect us against any attack from them, but the County can show no title whatever. It is a mere squatter or trespasser.

B.

THE ORGANIC LAW OF THE TERRITORY CONVEYED TO IT NO PROPERTY RIGHTS OF THE UNITED STATES.

The right to take back escheated lands by reversion, upon failure of heirs of the last tenant in fee, was a property right belonging to the United States, and there was no way for it to get into the territory, or its grantees, unless the United States had in some way conveyed or granted it to the territory.

If a new state were brought into existence with full sovereign power, all rights and incidents of sovereignty would vest in it, except such as remained in the general government as part of its powers under the constitution, *Etheridge vs. Doe*, 18 Ala. 565. But the organization of a municipality for governmental purposes, would not vest such municipality with any property rights of the United States, unless expressly given to it. No conveyance or grant of such rights can be found. No warrant for the territory's action in assuming to claim these reversionary rights in land, and transfer them to its counties, can be found unless it be derived from the grant of legislative powers to the territory contained in Sec. 1851, Rev. Stat. of U. S. 1874, which is as follows:

"The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents."

This is a grant of law-making power, pure and simple. It is no conveyance of property rights. On the contrary, it mentions the property of the United States, and commands the territory not to meddle

with it. It forbids it to interfere with the primary disposal of the soil, and forbids it to attempt to tax the federal property.

"The State or the public is not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless expressly named therein, or included by necessary implication. This general doctrine applies with especial force to statutes by which prerogatives, rights, titles or interests of the State would be divested."

36 Cyc. 1171.

"Statutes in derogation of sovereignty, such as statutes containing exemptions from taxation, or other public burdens, conferring sovereign powers upon corporations, or allowing suits against the State or its representative, should be construed strictly in favor of the State, and should not be permitted to divest the State or its government of any of its prerogatives, rights, or remedies, unless the intention of the legislature to effect this object is clearly expressed in the statute." "As a general rule, legislative grants of property, rights, or privileges must be construed strictly in favor of the public; and whatever is not granted in clear and explicit terms is withheld."

36 Cyc. 1177.

The escheat of lands was a subject matter which neither the territory, nor any of its branches, executive, legislative or judicial, had any power to interfere with.

C.

THE TERRITORIAL ACT GIVING ESCHEATED PROPERTY TO ITS COUNTIES TRENCHED UPON THE PRIMARY DISPOSAL OF THE SOIL IN A MANNER FORBIDDEN BY THE ORGANIC ACT.

Let us argumentatively concede that the act of the Territory giving escheated property to its counties was not a high-handed attempt to confiscate federal property, but was the passage of a law. Nevertheless, it was one of the laws which the territory was by its Organic Law expressly forbidden to pass. The grant of legislative powers, which we have above set out, specifically provides, "no law shall be passed interfering with the primary disposal of the soil."

When the United States as owner of the land *in allodium* granted an estate in fee, in case there was a failure of heirs of the tenant in fee, the land would revert to the United States. The United States would not take under the decedent, for his title had ceased, had become extinct. It would again hold the land by its original right *in allodium*, and when it again granted the land to another tenant,

such re-grant would be a primary disposal of the soil, a grant emanating from the original owner *in allodium.* Any law passed by the territory the effect of which would be to cut off the reversion, and divert it from the United States to the territorial counties, and prevent a new disposal of the same by the United States, would certainly be an interference with the primary disposal of the soil.

This view of the law is very clearly stated by the Supreme Court of Montana, in *Territory vs. Lee*, 2 Mont. 124. In this case the Territory of Montana had assumed to pass a law, whereby it was provided that all mining claims which were acquired by aliens should escheat to the Territory. It is true, that these mining claims were only easements in the land, but, in principle, there is no difference between an easement and the entire usufruct, both are real property. The same estates can be created in each. There can be an estate in fee in an easement, and an estate in fee in the entire usufruct of the land, and the same principles would apply as to their being escheated.

In this case the court says:

"The Territory had no interest whatever in the claims, held by aliens or by any other persons, and no title nor shadow of title thereto, but by the

operation of this statute the Territory becomes the owner of the possessory title which is or may be the entire equitable interest, and is authorized to sell the same for its own use, so that, by force of this statute, it becomes the owner of property in which it never had any interest and which never belonged to it, and it forfeits the property of an alien and calls it its own, while if any forfeiture takes place for any reason whatever, the property thus forfeited necessarily belongs to the United States. The Territory can not acquire title to property that does not and never did belong to it, so easily as this."

"Is this statute in harmony with the Organic Act of the Territory?"

"The Organic Act provides, section 6, that the territorial legislature shall pass no law interfering with the primary disposal of the soil. Notwithstanding the Organic Act whereby a temporary government is created for the Territory, the general government being the owner of the soil, still retains its ownership, and has made all the necessary laws and regulations directing how its property shall be disposed of, and how title thereto shall be conveyed. The Territory can enact no valid law that, in any manner, impedes, modifies or varies the operation of the laws of the general government as to the disposal of its lands. Neither can the Territory do, by indirection, what it is prohibited from doing directly, so that, if any Territorial statute, enacted for a local, or for a temporary purpose, in its workings, in its operations and effects, defeats the laws of congress as to the disposal of the public lands of the Territory, such statute is necessarily void. The statute in question provides that the mining claims held by aliens shall be forfeited to the Territory, so that the Territory becomes the owner of the possessory title to such claim. Laying aside the fact that

the Territory thus becomes the owner of property that does not belong to it, yet it obtains possession of the title, and this possession necessarily interferes with the disposal of the soil by the United States to the citizen or settler. If the possessory title is forfeited, the property should again become subject to location by the persons entitled to make such location, but the Territory comes forward and says, by its legislature, 'that although the title to this property is forfeited, and it thereby becomes subject to entry and location, yet I have acquired this property, and if anyone obtains possession of it they must purchase of me.' "

In *King vs. Ware*, 4 N. W. 858 (Ia.), the court had occasion to construe this inhibition against interference with primary disposal of the soil in a case where such inhibition was a part of the Organic Law of the State of Iowa. The Enabling Act under which the states of Iowa and Florida were admitted to the Union in 1845, imposed such an inhibition upon the states, and required them to irrevocably pledge themselves to obey the inhibition. The state of Iowa passed an act thus pledging itself in 1849.

This case does not in its facts, resemble the case at bar, but it does enunciate the principle that a law seeking to cut off from the United States the reversion of escheated lands, is one interfering with the primary disposal of the soil. In this case an alien had acquired certain lands from the United States by patent. After his death, it was sought to claim

that the property had escheated to the state of Iowa by virtue of an act of that state forbidding aliens to hold land. The court says: "It was not within the power of the state to question his title by escheating the lands." The application of this principle in this case is much stronger than what we are asking in the case at bar. In the case at bar, the inhibition was laid upon a Territorial government, which was not presumed to have any other powers than those specifically delegated to it, and which was not a sovereign. In the Iowa case, the inhibition was laid upon a sovereign state which would be presumed to have all powers of government except such as were forbidden to it by its Organic Law.

It seems to us that it is beyond dispute that the passage of the escheat law by the Territory of Washington, was an interference with the primary disposal of the soil by the United States Government.

D.

THE TERRITORIAL ACT GIVING ESCHEATED PROPERTY TO ITS COUNTIES HAD NOT, UNDER THE ORGANIC LAW, A TITLE BROAD ENOUGH TO COVER THE SUBJECT MATTER.

Congress saw fit to place certain restrictions upon the legislative power of the territories, and these are to be found in Sec. 1924, Rev. Stat. of U. S. 1874. These restrictions do not concern the question now under discussion, and so we will not enumerate them. The section closes with the following language:

"To avoid improper influences, which may result from intermixing in the same act such things as have no proper relation to each other, every law shall embrace but one subject, and that shall be expressed in the title."

A similar provision is to be found in the Constitution of almost every state in the Union, and while some courts have been very strict and some very liberal in construing the title of acts, still all agree that when a portion of an act is entirely foreign to the object of the title, the same must be held invalid. If such portion is not severable from the remainder of the act, the whole act falls. If it is severable from the remainder of the act, and its absence does not render inoperative the remainder of the act, then such portion falls, and the remainder of the act stands. These principles which we have stated, are announced in reference to the Constitution of the state of Washington in *Bradley E. & M. Co. vs. Muzzy*, 54 Wash. 227, which refers to, and

is based upon *Harland vs. Territory,* 3 Wash. Ter. 131, where they are laid down in reference to the identical Organic Law which is now under consideration.

The Probate Act of Washington Territory, originally passed in 1854, was re-enacted with little change in 1860. It will be found in the Wash. Sess. Laws 1859-60, pp. 165-237. The title of the act is:

"*An Act defining the jurisdiction and practice in the Probate Courts of Washington Territory.*"

It is divided into eighteen chapters, sixteen of which seem to properly refer to the jurisdiction and practice of the Probate Courts, but Chapters 2 and 14 have nothing to do with the title of the act. Chapter 2 is in reference to the making and construction of Wills, and has absolutely nothing to do with the jurisdiction and practice of the court. In like manner Chapter 14 regulates the descent of real estate, and also has absolutely nothing to do with the jurisdiction and practice of the court. This chapter 14 names those who shall successively inherit the real property of a decedent who dies intestate, and at its end, provides for an escheat of property to the county in case there is a failure of heirs. The opening and conclusion of this chapter are in the following language:

"When any person shall die seized of any lands, tenements, or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts as follows:" * * * "8th. If the intestate shall leave no kindred, his estate shall escheat to the county in which such estate may be situate."

This Chapter 14 regulating the descent of real property, can be completely severed from the remainder of the act, and as it treats of a subject matter and object which cannot by any possible construction come within the title of the act, it must fall and be held to contravene the Organic Law. The remainder of the act still composes a consistent whole, and therefore is not injured by the insertion of this improper but distinct matter. This is the only provision in the territorial laws in referencec to what shall become of escheated property, and if it is invalid, as is the case, it simply leaves the common law on that subject in force. Under that, the sovereign, the United States, would take all such lands by reversion. It does not seem to us as though the question of the invalidity of this act under the Organic Law could be called even debatable.

The only defense made to this position by opposing counsel was to hold up *in terrorem* a

wholesale destruction of titles to realty if the territorial law of descents was held invalid. This kind of an argument *ab inexpedienti* is only to be resorted to in desperate cases. It impliedly acknowledges that what the man who uses it is contending for, is not the law, but that it should be held because it is the best thing for the general good. In other words, it is a direct request to a judicial officer to legislate.

But let us see how extensive this threatened danger really is. This law of descent will be found in Chapter 14 of the Probate Practice Act of the Territory, Wash. Sess. Laws 1859-60. If it is held invalid, the common law will take its place. The only differences between this provision and the common law are, that if a person dies without issue, the father will inherit, if he survive, instead of the brothers and sisters. If there are no issue and no father, but one or more brothers or sisters living, and a mother, then the mother will take an equal share with the brothers and sisters. If there are no issue, and no father and no brother or sister living, the mother will take to the exclusion of any issue of deceased brothers or sisters. With these exceptions of the rights of the father and mother, the law is identical with the common law. Of

course in the great majority of cases, an adult owning property will have issue and so it is only in the rare cases where a father or mother inherit, that any title would be affected by holding this law invalid. But even these cases are much lessened by the fact that if the father or mother died without having disposed of their interests, the descent would be cast in the same place that the common law would have cast it. So that the cases affected are now reduced to cases where the father or mother take the estate and then convey it away to strangers. This leaves but few titles where the question could be raised at all. But only ancient titles could be affected. In 1881, the laws of the territory were codified and re-enacted as a whole, including this law of descents. (See Code 1881, Chap. CCLV.) To this codification the point we make cannot apply, and that law was valid in the territory since that time. Cases which come within the old statute prior to 1881 would all now be cured by the statute of limitations. The ten years statute of limitations creating a title by possession, has had an opportunity to run more than three times over. The seven years statute of limitations adopted in 1893 has had an opportunity to run for 19 years. Wherever the title had a chance to pass through judicial proceedings, so that the title was traced through a judicial

deed, all right to attack the same expired one year after the so-called three years' statute of limitations was enacted in 1907. At a glance the court can see that instead of, as was claimed, one-half of the titles in the state being unsettled, there could not possibly be one title out of a hundred where the question could be raised, and not one out of a hundred of those in which it would not be cured by the statute of limitations, and that is not allowing for the practical protection to be derived from the fact that no person whose rights, if they had any, arose more than 31 years ago, would ever be likely to find out that they had any such rights. In a word, it could only apply to some phenomenal case like that at bar where the property had remained continuously in the same person's hands, and under such circumstances that that person did not hold adversely. It is well nigh impossible that any other case like this will ever arise in this state. Not one title in ten thousand could be affected, and it is not likely that any such ever would be. Is this bogey so terrifying that, like frightened children, we should run and hide for protection behind the skirts of expediency?

E.

THERE NEVER WAS ANY OFFICE FOUND.

As a matter of fact this property never did escheat. At the time of his death Lars Torgerson, alias John Thompson, left surviving him in Norway, two brothers, one sister and the children of a deceased sister, and a son of one of his sisters claiming in his own right as heir and as grantee of the interest of all the other now living heirs, stands now before this court in the person of the plaintiff, demanding possession of the lands which belonged to his uncle at the time of the latter's demise. All the heirs of Torgerson, alias Thompson, living at the time of his death, were subjects of the King of Sweden and Norway, and the plaintiff who brings this suit, is the same. Although these heirs were aliens, they were able to inherit. More than a year before the death of Torgerson, alias Thompson, the legislature of the Territory of Washington (Sess. Laws 1863-64, p. 12) passed "An Act to enable aliens to acquire and convey real estate," and which was in the following language:

"Section 1. *Be it enacted by the Legislative Assembly of the Territory of Washington*, That any

alien may acquire and hold lands, or any right thereto, or interest therein, by purchase, devise or descent; and he may convey, mortgage and devise the same, and if he shall die intestate, the same shall descend to his heirs, and in all cases such lands shall be held, conveyed, mortgaged or devised, or shall descend in like manner and with like effect as if such alien were a native citizen of this territory, or of the United States."

"Sec. 2. The title to any lands heretofore conveyed shall not be questioned, nor in any manner affected by reason of the alienage of any person from or through whom such title may have been acquired."

But these heirs also claim by a higher right. The first Treaty ever made by any foreign government with the United States of America was concluded Aprl 3, 1783, with Sweden and Norway, and the same was extended by a new Treaty entered into July 4, 1827. By Article VI of this Treaty, it is provided that the subjects and citizens of the contracting parties, shall be allowed to inherit property in the countries of each other. That this Treaty covers real estate, has been held by the Supreme Court of Washington in the case of *In re Sixtud's Estate*, 58 Wash. 339, and the same construction has been put upon this Treaty by the Supreme Court of Illinois in *Adams vs. Akerland*, 49 N. E. 454.

But though as a matter of fact there never really is any failure of heirs, because every person must somewhere on the globe have blood relatives, still there is such a thing as failure of heirs as a matter of law. The sovereign power can take steps in its own courts to have it judicially determined that there are no heirs, which proceeding has in the English law the name of "office found." When there has been such an official determination that heirs cannot be found, then the natural presumption of heirship is destroyed, and thereupon the reversion to the sovereign is legally effected; though when it has thus been effected, such action relates back to the time of the tenant's death, and the sovereign can claim all property rights that have enured since that time. But until there has been "office found," no lands can escheat. At the time of the death of Torgerson, alias Thompson, there was a law in the Territory of Washington providing a procedure for escheating property. Of course we claim that all laws on the subject of escheat passed by the Territory are nullities, but for the sake of argument, admitting that the Territory could claim escheated property, it was not done properly in accordance with its own laws in reference to the land involved in the case at bar. This method of procedure is fixed in the Civil Practice Act of the

Territory, Chapter 52, Sec. 480, Session Laws 1854, page 218, which is as follows:

"Whenever any property shall escheat or be forfeited to the territory, for its use, the legal title shall be deemed to be in the territory, from the time of the escheat or forfeiture; and an information may be filed by the prosecuting attorney in the district court, for the recovery of the property, alleging the ground on which the recovery is claimed, and like proceedings and judgment shall be had as in a civil action for the recovery of property."

The sovereign does not take escheated property as a successor to the decedent. For failure of heirs the title of the decedent ceases and terminates; the original title of the sovereign revives and the title of the sovereign is based upon its original ownership, and not upon the ownership of the decedent. This seems almost too axiomatic to need a citation of authorities, and we will refer the court to only a couple of the numerous ones that exist.

"In no proper sense, we apprehend, can the State be styled an heir, when, in the absence of heirs of every denomination by law capable of succeeding by inheritance, the property of the deceased owner becomes vested in the public, and is at the disposal of the government." * * * "The State is not in reality an heir or a successor, in the technical sense of this word, for it acquires by the title of escheat; that is to say, precisely in virtue of a title which supposes, necessarily, that there are no heirs; which caused Bacquet to say that, when a man dies

without heirs, the goods left by his death *non vocantur bona hereditarea sed vacantia nominantur.* In a word, the State exercises in this matter the eminent right of sovereignty, in virtue of which it appropriates all property without a master which is found within its territory." *State vs. Ames*, 23 La. Ann. 69-71.

"The state, however, does not come in by way of succession, but in the event of the absence of all who are entitled to come in by succession, whether the property be real or personal, it goes to the state by escheat." *In re Minor's Estate*, 76 Pac. 968 (Cal.).

That it is necessary to have a proceeding of "office found" before title to escheated lands can re-vest in the sovereign, has been held by every court that has had occasion to pass upon this question.

"It seems very clear that, in every case of a failure of succession for want of heirs or kindred of the decedent, an action of escheat becomes necessary to vest the title in the state, whether the estate so escheated consist of real or personal property. And this is the view heretofore expressed by this Court in *People vs. Roach*, 76 Cal. 294; 18 Pac. 407."

In re Minor's Estate, 76 Pac. 968 (Cal.).

"But where a subject dies intestate, as the estate descends to collateral kindred indefinitely, the presumption of law is that he had heirs, and this presumption will be good against the Commonwealth until they institute the regular proceedings by inquest of office, by which the fact whether the intestate did or did not die without heirs, can be

ascertained, and if this fact is established in favor of the Commonwealth, it rebuts the contrary presumption, and the Commonwealth, by force of the judgment, and of the statute before cited, become seized in law and in fact. In such case therefore, the Court are of opinion, that an inquest of office is necessary, and that the Commonwealth cannot be deemed to be seized without such inquest. *Jackson vs. Adams*, 7 Wend. 367; *Doe vs. Redfern*, 12 East 96."

Wilbur vs. Tobey, 33 Mass. 177-180.

"Land is not escheatable as long as there are heirs of the original tenant or grantee.

"Escheat is that possibility of interest which reverts to, or devolves on the lord, upon the failure of heirs of the original grantee; and he cannot grant the land again until that event happens; and if he does, his grant will pass nothing, and cannot impair any right or interest acquired under his original grant."

Hall vs. Gittings, 2 Har. & J. 112-125 (Md.).

"When the owner of real property dies intestate without heirs capable of inheriting it, the title thereof devolves, by operation of law, upon the state. Yet, when thus acquired, the state cannot make its title available without first establishing it in the manner prescribed by law. This is done by the institution of a purchase proceeding in the proper court, in the name of the people, for the purpose of proving and establishing by a judicial determination title to the state. The facts essential to the existence of the state's title are specifically set forth in the statute, and must be clearly proven on the hearing. The proceeding is in the nature of an inquest of

office, and the record of it is the only competent evidence by which a title by escheat may be established."

Wallahan vs. Ingersoll, 7 N. E. Rep. 520 (Ill.).

"Helme stood in the same condition, in this respect, as any other citizen of the State; if any natural born citizen dies without heirs, his lands escheat, but the State has no right to enter and take possession until office found, and any grant that they may make of such lands, whether by patent or otherwise, can convey no title, because, until office found, the State had no title, as every man is presumed to have heirs, until the contrary is shown."

Jackson vs. Adams, 7 Wend. 367 (N. Y.).

"By the civil as well as the common law, the King cannot take upon himself the possession of an estate said to have been escheated, until the fact is judicially ascertained by a proceeding in the nature of an inquest of office."

People vs. Folsom, 5 Cal. 379.

To like effect are:

Peterkin vs. Inloes, 4 Md. 175;

University vs. Harrison, 90 N. C. 385;

Chatham vs. State, 2 Head (Tenn.) 553;

People vs. Fire Ins. Co., 25 Wend. 218;

Hammond vs. Inloes, 4 Md. 138;

Wideranders vs. State, 64 Tex. 133.

This Washington statute specifically provides what officer shall procure the escheated property; what form of action he shall utilize; what court he shall bring action in, and that in regard to other matters he shall look to the common law. The court in which the prosecuting attorney is directed to file his information is the district court of the territory, which was the court of general common law and chancery jurisdiction, and not the probate court of the territory, which was a court of limited jurisdiction, and in which the proceedings shown in the case at bar were had. No such proceeding as is required by the statute of the territory was ever brought to escheat the lands involved in this case. Furthermore no legal proceeding of any kind to quiet title or procure title for the defendant were ever brought by it or any public officer for it which might possibly have been construed to have been a substitute for an escheat proceeding. Therefore the land in question was never escheated as a matter of law.

Counsel disputed our statement that it is necessary that there should be an inquest of office to terminate the presumption of heirship before property can fully escheat to the sovereign. In support of their view, they cited certain cases, the language

used in which would seem at first glance to hold as they contend, but a careful examination of all the authorities will show that they can be divided into two classes, the difference between which consists in who is the person raising the question of the sufficiency of the sovereign's title by escheat. If a person dies and no heirs appear upon the scene, the sovereign has a perfect right to take possession of the property as against all others, except those claiming under the decedent, and take care of the property until in due course of law an inquest of office can be had, and then after such inquest of office, the title of the sovereign is good against the whole world, including the heirs of the decedent, the presumption of whose existence has been destroyed by the inquest of office. If a careful examination is made of the cases (and we have tried to make one), we think it can be safely stated that in every case where it has been held that no inquest of office was necessary, it has been some person claiming under a strange title who was contesting the title by escheat, and it was held that the sovereign or the person claiming under him, could establish the title by escheat by proving the non-existence of heirs without showing that there had been office found. But in every single case where the person challenging the title by escheat has been an heir (as in the

case at bar), or someone claiming under him, it has been held that an inquest of office was necessary.

In *Hamilton vs. Brown*, 161 U. S. 261, this Court emphatically laid down the common law to be that office found was necessary to establish the title of the sovereign to escheated property. In reference to the American law Justice Gray in his opinion says:

"In this country, when the title to land falls for want of heirs and devisees, it escheats to the state as part of its common ownership, either by mere operation of law, or upon an inquest of office, according to the law of the particular state. 4 Kent, Com. 424; 3 Washb. Real Prop. (4th ed.) 47, 48."

This simply amounts to saying that a state has a right to abolish inquest of office if it sees fit; that if the state law provides for inquest of office, it must be had, and if the state law is silent upon the subject, and the common law is in force in that state, then also an inquest of office must be had.

This case of *Hamilton vs. Brown* was one which came up from the State of Texas. In that State there was a statutory escheat proceeding. The record showed that all resident claimants had actually been served with process and all unknown claimants constructively served by publication. Every detail of the statute had been complied with and the Court

held the proceeding to be one *in rem* and that when properly carried out according to the statute was "due process of law."

In the Territory of Washington, there was a law providing that proceedings to escheat property should be brought by the prosecuting attorney by an information filed in the district court and so under the law as laid down by this Court in *Hamilton vs. Brown*, an inquest of office in pursuance of such statute was necessary. In the case at bar, no proceedings were ever had under this escheat statute.

For the foregoing five reasons which we have stated under the sub-headings A., B., C., D. and E., we insist that the land in question in this case was never escheated, and neither the defendant in the case at bar, nor its predecessor, the territorial county of King, ever acquired any right, title or interest by escheat.

III.

THE PROCEEDINGS IN THE TERRITORIAL PROBATE COURT WERE IN LEGAL EFFECT AN ABSOLUTE NULLITY.

The Probate Court of the Territorial King County had no jurisdiction whatever over matters of escheat, and if it had had, the proceedings shown in this record were jurisdictionally defective; for the following reasons:

A. The Organic Law did not grant such jurisdiction to the Probate Court.

B. The Organic Law forbade any Territorial Court from interfering with the primary disposal of the soil.

C. The Territorial Act which assumed to give the Probate Court jurisdicticon of escheats was invalid under the Organic Act, because of insufficient title.

D. The Territorial Act defining the jurisdiction of the Probate Court did not cover escheats.

E. The proceedings which were had, were under the Territorial law insufficient to give jurisdiction.

F. The proceedings which were had in the Territorial Probate Court were not due process of law.

A., B. AND C.

These same three grounds were above given as reasons why the legislative branch of the territorial government could not pass any law escheating lands to the territorial counties. It follows as a necessary corollary that if the legislative branch of the government could not enact any laws upon a subject matter, that the judicial branch of the government could not possibly have any power over the subject matter of construing and enforcing such laws. Therefore the Territorial Probate Court of King County had no jurisdiction over the matter of the escheat of lands to the territory or its counties.

D.

THE TERRITORIAL ACT DEFINING THE JURISDICTION OF THE PROBATE COURT DID NOT COVER ESCHEATS.

The judicial power of the territory of Washington was by act of Congress (Sec. 1907 Rev. Stat. of U. S. 1874) vested in a Supreme Court, District Courts, Probate Courts and in Justices of the Peace. The Organic Act of the territory in Sec. 9 (Session Laws 1854, p. 36) provides as follows:

"The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace shall be as limited by law"; "and the said supreme and district courts respectively shall possess chancery as well as common law jurisdiction."

The probate courts are not otherwise mentioned in the Organic Act. It will thus be seen that the district court was the court of general common law and chancery jurisdiction, and that the probate court was a court of limited jurisdiction, as its name alone would imply. The legislature in the probate act of the territory to which we have above referred, defined the jurisdiction of the probate court. The provision on this subject is found in Sec. 3, chap 1, of the Probate Act (Sess. Laws 1859, pp. 165-237), and is in the following language:

"Sec. 3. That the probate court shall have and possess the following powers: Exclusive original jurisdiction within their respective counties in all cases relative to the probate of last wills and testaments; the granting of letters testamentary and of administration, and revoking the same; the appointment and displacing guardians of orphan minors, and of persons of unsound mind, and the binding of apprentices; in the settlement and allowance of accounts of executors, administrators and guardians; to hear and determine all disputes and controversies respecting wills, the right of executorship, administration and guardianship, or relative to the duties and accounts of executors, administrators and guardians; and to hear and determine all dis-

putes and controversies between masters and their apprentices; to allow and respect claims, against estate of deceased persons as hereinafter provided; to award process, and cause to come before said court all and every person or persons whom they may deem it necessary to examine, whether parties or witnesses, or who, as executors, administrators or guardians, or otherwise, shall be entrusted with, or in any wise accountable for any minor orphan, or person of unsound mind, or estate of any deceased person, with full power to administer oaths and affirmations, and examine any person touching any matter of controversy before said court, or in the exercise of its jurisdiction."

If these provisions be examined with a microscope, it would not be possible to find a single microbe of jurisdiction over escheats. Besides not only the District Court, which was the court of general common law and chancery jurisdiction, would on that account have jurisdiction over escheat proceedings, but also a statute of the territory which we have above set out in full, and which is found in Section 480, Chapter 52, Session Laws 1854, p. 218, expressly provided that such proceedings should be brought by information filed by the prosecuting attorney in the District Court. Therefore under the written law of the Territory, if any of its courts did have jurisdiction over escheat matters, it would not be the Probate Court which assumed to escheat the property involved in the case at bar. The proceeding in the Probate Court was *coram non judice.*

As we have above shown, citing authorities, the county in claiming escheated property, would not be claiming through or under the decedent. The title of the heirs of Lars Torgerson would be traceable through a chain of conveyances from the United States, and the claim of the County would be that it was the successor to the United States as to the reversionary right of escheat. So these two claims would be distinct and disconnected, though tracing from the same source. That a Probate Court has not got jurisdiction to settle any claims to property made by persons not claiming by, through or under the decedent, seems so self-evident that it ought not to require the citation of authorities. However we refer the court to a few, in the first of which the court was construing the powers of this same territorial probate court of Washington.

"While it is true that the probate court has jurisdiction to determine the claims to property as between those interested in the estate, this authority only goes to the extent of determining their relative interests as derived from the estate, and not to an interest claimed adversely thereto."

Stewart vs. Lohr, 1 Wash. 341-343.

"The powers of the Superior Court in respect to its probate jurisdiction are the same as they would be if it were in fact a separate probate court. Proceedings in probate matters, in actions in

equity, and at common law are distinct, and should not be intermingled except in cases specially authorized by law. Regarding the jurisdiction of probate courts, Judge Works, in his valuable work on the Jurisdiction of Courts (at pages 432, 433) says:

"'And where probate jurisdiction is vested in courts of general jurisdiction, it is usually held that proceedings in probate must be treated as distinct from its law and equity jurisdiction, and as if it were a separate and distinct court of probate.'"

In re Alfstad's Estate, 27 Wash., pp. 176-182.

"It is next argued that the probate court had no power in this proceeding to determine the title of third parties claiming the fund in question. This court held in *Stewart vs. Lohr*, 1 Wash. 341 (25 Pac. 547; 22 Am. St. Rep. 150) that the probate court is without jurisdiction to try the title to property as between the representatives of an estate and strangers thereto. See, also, *Huston vs. Becker*, 15 Wash. 586 (47 Pac. 10), and *In re Alfstad's Estate*, 27 Wash. 175 (67 Pac. 593). Under these decisions the Superior Court sitting in probate had no jurisdiction to determine the title of third parties claiming the fund."

In re Belt's Estate, 29 Wash., pp. 535-540.

"We see nothing in the allegations of the parties, nor in the evidence adduced, which could enable the court of probates to take cognizance of the case. That court is the proper one to make a partition of a succession, where the parties claim as heirs or legatees; and no defence is made under another title, or in a different capacity. In the present case, if the minor heirs had wished to make a division of

effects which they held in common, they would have been before the proper tribunal; but the object is to recover from a party who claims adversely to them and to their ancestor, and the ordinary courts can alone settle that question."

Harris' Tutor vs. McKee, 4 Mart. (N. S.) 485 (La.).

It will thus be seen that the proceedings of the Probate Court of the Territory which appear in this record assuming to escheat the property in question were an absolute nullity because the court was without jurisdiction of the subject matter.

In this connection counsel argued to the court below that because the probate court had power successively to pass upon the existence or non-existence of certain persons who would take under the decedent, it had a right to decide there was no one who could take under the decedent, and such decision would be binding on everybody. The trial judge took some stock in this argument, and in his opinion asks: "Why was it not equally competent for the probate court to determine there were no kindred and to escheat the property to the county?" This is a double question.

We will answer the first half by saying that the probate court had such power and could deter-

mine there were no kindred for the purpose of deciding that its jurisdiction had ceased, and there was nothing further for it to exercise its probate functions on, as it could not exercise the final act of administration by distributing the estate when there was no one to distribute it to.

The second half of the question we will answer by saying that the probate court could not act, because jurisdiction had ceased, and it could go no further, and the next step of escheating the property was entirely within the province of another court acting under a different method of procedure. Court and counsel both erroneously assume that the distributing of an estate of a decedent, and the act of declaring an escheat, are one and the same thing. They certainly are not. The distribution of an estate is the act of setting off their respective shares of the estate to those who claim under the decedent. The declaration of an escheat is a decision that the title of the decedent has terminated, and that an outside party not claiming under the decedent is entitled to the possession of the property by reason of a reversion upon failure of an intermediate estate. The declaration of an escheat is not the exercise of the probate function. In this connection we call the court's attention to the fact that the principal

powers of judicial officers under the Anglo-Saxon jurisprudence which we have inherited are of four kinds (although there are other lesser ones): Legal, Equitable, Criminal and Ecclesiastical. Although the modern tendency, under Codes, has been to abolish differences in procedure as much as the nature of the subject matter will allow, still these different judicial functions are entirely separate and distinct. They acquire jurisdiction by different kinds of *mesne* process. Their issues are made by different kinds of pleadings. They hear different kinds of evidence and require different degrees of proof. They enter different kinds of judgments, giving totally distinct kinds of relief or imposing distinctly different penalties. They issue entirely distinct and separate kinds of judicial process. There is no such thing as intermingling these different functions except in cases where the legislature by express enactment has seen fit to so authorize. With these premises, we answer the judge's question emphatically "No," for three reasons: 1st, Because when the judge has by a process of elimination reached the conclusion that there is no one claiming under the decedent to whom to distribute the estate, he has at the same time reached the conclusion that his probate jurisdiction has ceased. 2d, The probate proceedings culminating in a dis-

tribution are based upon certain *mesne* process, in this case a four weeks' publication. The process which would be necessary to sustain the jurisdiction of the court for escheating purposes would be a twelve weeks' publication. Therefore the court no longer has jurisdiction of the subject matter, for lack of process on which to base his further acts. 3d, To allow a person hitherto an entire stranger to the proceedings to suddenly come into the same and undertake to assert a legal right to divest others of the title to property, would be to suddenly transfer the cause from the ecclessiastical court to the court of common law. Let us look at some of the things which could be done if what is here sought to be done, were allowed.

A man is indicted for obtaining money under false pretenses. It transpires it was an honest loan. The parties are all before the court. Why not render a monetary judgment in favor of the prosecuting witness and against the criminal? Or invert the case.

One man sues another for a sum of money which he gave him. It transpires that the money has been repaid, but was originally obtained by false pretenses. Why not sentence him to the penitentiary?

The administration of an estate is begun in the probate court, the decedent having left real property. It transpires that upon this property there is a mortgage and also a mechanic's lien. Why not allow both the mortgagee and the lien claimant to come into the probate court and enforce their encumbrances? The land is before the court, the persons claiming under the decedent are before the court. What harm is done by letting in a couple of strangers and letting the probate court try its hand at exercising equitable functions?

These illustrations we admit are silly and ridiculous, but they are exactly analogous in principle to what was done by the territorial probate court in the case at bar. To our way of thinking it borders on the humorous to suggest that a court by finding a successive series of facts, can by a process of elimination, destroy its own jurisdiction over the subject matter, and *eo instanti* that it disappears, acquire a new jurisdiction for a different purpose.

This court clearly distinguishes the difference between a probate proceeding and an escheat proceeding in the case of *Hamilton vs. Brown*, 161 U. S. 261, in which Justice Gray says:

"But the whole object in proceedings for es-

cheat, as in proceedings of administration, is to ascertain who are entitled to the estate of a deceased person; in proceedings of administration, to distribute the assets, after payment of debts, among those who come forward and prove themselves to be next of kin; in proceedings for escheat, to ascertain and determine, once for all so far as concerns the title in the land itself, whether the former owner left no heirs or devisees, that being the single question on which depends the issue whether or not the land has escheated to the state."

E.

THE PROCEEDINGS WERE INSUFFICIENT, UNDER THE TERRITORIAL LAWS TO GIVE JURISDICTION.

Admitting argumentatively, that the territorial probate court had the power in the course of probate proceedings, to enter a final order escheating property of the decedent, still in the case at bar, the whole of the probate proceedings would be null and void, because under the law of the Territory as it was then framed, the probate court did not acquire jurisdiction over the estate of John Thompson at the beginning of the probate proceedings, and so all subsequent proceedings were null and void. We assume that it will be conceded that the territorial probate court was a court of limited jurisdiction; that all proceedings of a court of limited

jurisdiction must show the facts necessary to its jurisdiction upon the face of its records or its proceedings will be void, and that when a statutory method of procedure is provided it must be followed, or such proceedings will be void. Decisions in support of these propositions could be cited from every state in the Union, and though the decisions in most cases are constructions of the specific written law of the respective states, still they are unanimous in enunciating these principles.

This is a proceeding *in rem*, and if the initial steps required by the law are not correct, the *rem* is never brought within the jurisdiction of the court.

The petition for letters of administration and the order appointing the administrator in the case at bar, are so deficient that the whole proceedings based upon the same are null and void, the court never having obtained jurisdiction over the estate of John Thompson, alias Lars Torgerson.

Section 90 of the Probate Practice Act of the Territory (Sess. Laws 1859, p. 182) prescribing the method of obtaining letters of administration, states the requirements of the petition in the following language:

"Application for letters of administration shall be made by petition in writing, signed by the applicant or his attorney, and filed in the probate court, which petition shall set forth the facts essential to giving the court jurisdiction in the case, and such applicant, at the time of making such application, shall make an affidavit, stating, to the best of his knowledge and belief, the names and places of residence of the heirs of the deceased, and that the deceased died without a will.

In reference to these jurisdictional requirements, two questions arise, namely, the venue of the administration and the person entitled to take out administration.

In regard to the first, the law of the territory (Sess. Laws 1859, p. 173) was as follows:

"Sec. 43. Wills shall be proved and letters testamentary or of administration shall be granted.

1st. In the county of which the deceased was a resident, or had his place of abode at the time of his death.

2d. In the county in which he may have died, leaving estate therein, and not being a resident of the territory.

3d. In the county in which any part of his estate may be, he living out of the territory, and not having been a resident thereof at the time of his death.

Sec. 44. When the estate of the deceased is in more than one county, he having died out of the

territory, and not having been a resident thereof at the time of his death, the probate court of that county in which application is first made for letters testamentary or of administration shall have exclusive jurisdiction of the settlement of the estate."

In regard to the second, the law of the territory (Sess. Laws 1859, p. 181) was as follows:

"Sec. 89. Administration of the estate of a person dying intestate, shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the order:

1st. The surviving husband, or wife, or such person as he or she may request to have appointed.

2d. The children.

3d. The father or mother.

4th. The brothers.

5th. The sisters.

6th. The grand children.

7th. Any other of the next of kin, entitled to share in the distribution of the estate. Provided, That nothing hereinbefore mentioned shall be so construed as to prevent the judge of probate from appointing any disinterested and competent person or persons to administer such estate, when requested so to do, by petition of any person or persons interested in a just administration thereof."

The only petition for letters of administration filed in the Thompson estate was as follows:

"Petition to the Honorable Probate Court:

I would most respectfully ask to have Mr. Daniel Bagley appointed administrator of the estate of John Thompson, deceased.
Dated March 11, 1865. H. L. YESLER,
J. WILLIAMSON."

This is simply a letter from two citizens, Yesler and Williamson, who are not shown to have the slightest interest in the estate or to be entitled to administration, addressed to the probate court and asking the appointment of Daniel Bagley, another total stranger, as administrator of the estate of John Thompson. We need not compare this with the statute above cited, for the court can see at a glance that it does not state a single jurisdictional fact showing that the court had jurisdiction to administer the estate of Thompson.

The only order appointing Bagley administrator was as follows:

"Whereas, John Thompson, of the county aforesaid, on the —— day of March, 1865, died intestate, leaving at the time of his death property subject to administration,

Now, therefore, know all men by these presents, that I do therefore appoint Daniel Bagley administrator upon said estate, and authorize him to administer the same according to law.
Dated March 26, 1865. THOMAS MERCER,
Probate Judge."

This order does not show the necessary jurisdictional facts any more than does the petition upon which it is based; though even if it did, all proceedings would be void if the petition was defective. We shall not overwhelm the court with citations, but refer to the cases in the notes to that portion of the text of Cyc. found in Vol. 18, p. 122, which is as follows:

"The usual and regular method of applying for administration is by a petition or bill asking the appointment of the petitioner, or in some cases of some other person; and it has been held that an administrator can be appointed only when a proper petition is filed for that purpose. Jurisdiction to appoint should appear affirmatively on the face of the petition and the necessary facts should be alleged, such as death, last residence of decedent, the existence and *situs* if need be of assets, intestacy, where this is relied on, the right of the person who seeks administration, as next of kin, creditor, or otherwise, to be appointed, and, it has been held, the fact that he is qualified for the office."

The probate proceedings shown in this record are absolutely void upon their face, because of the manner in which it was attempted to conduct them, irrespective of the question of whether the court had jurisdiction of the subject matter. The proposed administration was conducted contrary to law in its initial step, and so all subsequent proceedings are necessarily void, and the court never

acquired any jurisdiction either over the *rem*, the estate of Thompson, nor constructively over his heirs.

In the courts below it was claimed by counsel that the validity of these proceedings cannot be attacked collaterally. In this they are certainly mistaken. It is laid down distinctly in the first chapter of Van Fleet on Collateral Attack, that all judicial proceedings are subject to collateral attack where such attack is based upon lack of jurisdiction upon the part of the court. This is almost always so where the lack of jurisdiction is that of the person, but it is so without any exceptions where the lack of jurisdiction is that of the subject matter, and in this point which we are making, we are attacking the court on the ground that it never obtained jurisdiction over the *rem*, which was the estate of Thompson. Had the court obtained jurisdiction, then we frankly admit this court could not inquire into the question of whether its proceedings were erroneous or not. Errors could only be corrected by appeal. But we are not seeking to correct any errors. We simply claim that the whole proceedings are an absolute nullity.

F.

THE PROBATE PROCEEDINGS WERE NOT DUE PROCESS OF LAW.

By the so-called decree of distribution entered by the territorial probate court, it was attempted to divest the heirs of John Thompson, alias Lars Torgerson, of the title of their ancestor to the land in question. We insist that this proceeding is not "due process of law" as that phrase is understood in American Constitutional Law. The Fifth Amendment to the Constitution of the United States ratified December 15, 1791, *inter alia* provided "No person shall be" * * * "deprived of life, liberty or property without due process of law." This, of course, was an inhibition laid upon the national government which came into existence under that Constitution. Later in 1868, by the Fourteenth Amendment this inhibition was likewise laid upon the state governments. Of course it is the first inhibition that concerns us, since the probate proceedings in question took place during territorial days, though most of the decisions construing this phrase "due process of law" have been decided under the Fourteenth Amendment. There have been many definitions of the phrase enunciated by the

courts of last resort, and we respectfully refer the court for them, to Vol. 8 of Cyc. p. 1080.

The essential elements which we, in this case, invoke, are, that there must be an opportunity to be heard, or to use the more common expression, the party must have his "day in court"; that some notice, actual or constructive, must be given to the party interested; and that the proceedings taken shall be instituted and conducted according to the prescribed forms and solemnities for determining the title of property which are in vogue within the territorial jurisdiction for which the court is acting.

In a few words, we now wish to call the Court's attention to the nature of this proceeding in the territorial probate court.

It began March 26, 1865, by the filing in court of a letter addressed to the court by two ordinary individuals in no manner shown to be connected with John Thompson, requesting the appointment of another uninterested party to be administrator of Thompson's estate. On the same day the court rendered an order appointing the person so requested, to be administrator. Neither of these documents had any of the legal elements of a petition for letters of administration, or of an order ap-

pointing an administrator, as we have above shown. The estate seems to have lain idle for about three years, and then the Commissioners of the territorial county of King began to interfere by coming into court and asking to have the affairs of the estate closed up, and the property turned over to the County as escheated property. Nothing however, was done by the Court until after the administrator on February 12, 1869, filed a petition in which he asked to have the estate closed, and his accounts approved, and the property turned over to the County. And now on March 29, 1869, the court for the first time acted. Up to this time the proceedings appear to have been a defective attempt to administer a decedent's estate in the course of which the County had come in and claimed the property of the estate as escheated, and the administrator, by the petition which he filed, seems to have admitted that fact. The proceeding to this date has not a single element or form of an escheat proceeding. Nothing done by the court or by any of the parties, had given the proceeding the slightest resemblance to an escheat proceeding. And now the court, in pursuance of the administrator's petition, entered an order which was published once a week for four weeks in a newspaper. This order and its publication, was the only thing in the whole

of the proceeding which in the slightest degree resembled process, and it was addressed to "all persons interested in the estate of the said John Thompson, deceased," and they were ordered to appear "to show cause why an order of distribution should not be made of the residue of said estate *among the heirs of the deceased according to law.*" Not one word that there was any intention on the part of the court to attempt to escheat the property. Upon the return day of this process, the matter was continued and when taken up at the end of the continuance, the estate was closed up and the land was declared escheated.

Looking at this final decree of distribution, we find that it recites, that the administrator appeared in person, but no one else; that the usual steps in the administration of an estate, such as the inventory, appraisement, notice to creditors and the like, had all been taken; it recites there was presented to the court the documentary evidence showing these facts, and that the administrator was examined under oath; there is no hearing of any kind as to the existence of heirs recited, but the court suddenly makes a finding that there are no heirs; then the court enters the usual orders approving what was done in the course of administration and discharg-

ing the administrator; then the court distributes the entire estate to the County of King in Washington Territory; and then the court makes a statement as to what composes the estate including the land in question in this case. Up until the entry of the final order, everything appears to have been an ordinary administration of an estate in the ordinary course of probate and the forms and procedure suited to such a proceeding were used, the notice which was published being published in pursuance of the terms of the statute requiring a notice to be published of the closing up of estates (Secs. 317-18-19, Sess. Laws 1863, p. 257.) It is true the county had filed some papers in court, saying it claimed the property was escheated and that the administrator in his final report also declared that to be his opinion, but the order which was published based upon such report, said nothing about escheat, and the court took no proceedings of any kind which showed that it was dealing with the matter of escheats until it suddenly entered the final decree of distribution, and then without anything on which to base such an act, it suddenly escheated the property. Thus it will be seen that the heirs of John Thompson never had their day in court in the matter of escheating the property of their ancestor. Without any pleadings or issues involving such a

question being before the court; without evidence heard, the court unexpectedly and suddenly acts. This is not due process of law.

The second principle in reference to due process of law, is that there must be some kind of process, actual or substituted, served upon the party whose rights are to be affected or divested. The only proceeding in this estate which even bears a semblance to process is the order of the final closing of the estate which was published once a week for four weeks, and this notice expressly ordered the parties to appear for the purpose of having the estate distributed among the heirs of Thompson. There was therefore no process of any kind on which this order of escheat was predicated, and so there was not due process of law.

At the time these probate proceedings were had, there was on the statute books of the Territory of Washington, a statute providing a procedure for escheating property. We have cited it before in full, and it is found in Sec. 480, Chap. 52, Sess. Laws 1854, p. 218. It is thereby provided that any suit to escheat property shall be brought by the prosecuting attorney by information in the district court, and that "like proceedings and judgment shall be as in a civil action for the recovery of prop-

erty." Turning to the Civil Practice Act of the territory in Sec. 22, Chap. 3, Sess. Laws 1859, p. 9, we find provision made as to how parties shall be brought before the court by constructive service by publication. Such portion of that section as applies to the case at bar is in the following language:

"In case personal service cannot be had, by reason of the absence of the defendant, and the defendant is a proper party to an action where actual personal notice is not required by law, or is a proper party to an action relating to real estate in the district, it shall be proper to publish the notice, with a brief statement of the object and prayer of the petition or complaint, in some weekly newspaper published in this territory, or in Portland, Oregon; which notice shall be published not less than once a week for three months prior to the commencement of the term of the court when such cause shall be heard."

This statute not only applies to civil actions in general, and thus is included in the reference to civil procedure made in the other act, but by its own terms it particularly applies to any action which might be brought to divest parties of title to real estate, because it says, that this method of service shall be used whenever the defendant cannot be actually served, or whenever the defendant is a proper party to an action relating to real estate. It will thus be seen that there was in the laws of

the territory a complete method of procedure prescribed for bringing escheat proceedings, and incidentally thereto bringing parties interested before the court by constructive process. Had there been any attempt to conform to this method of procedure and the jurisdictional portions of the law complied with, the proceeding would have been due process of law. But when this probate court of limited jurisdiction assumed to confiscate the property of the decedent, and transfer it to some one besides his heirs, the proceedings were not instituted and conducted according to the prescribed forms and solemnities for determining the title of property which were in vogue within the territorial jurisdiction for which the court was acting, and therefore were not due process of law.

In the case of *Hamilton vs. Brown*, 161 U. S. 261, this exact question was the one before the court and the court held that an escheat proceeding was a proceeding *in rem* and that if it was properly conducted and all the details of the law complied with it would constitute due process of law. This holding of the court is summed up in the concluding paragraph of Justice Gray's opinion, as follows:

"When a man dies the legislature is under no constitutional obligation to leave the title to his

property, real or personal, in abeyance for an indefinite period; but it may provide for properly ascertaining, by appropriate judicial proceedings, who has succeeded to his estate. If such proceedings are had, after actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown, the final determination of the right of succession, either among private persons, as in the ordinary administration of estates, or between all persons and the state, as by inquest of office or similar process to determine whether the estate has escheated to the public, is due process of law; and a statute providing for such proceedings and determination does not impair the obligation of any contract contained in the grant under which the former owned held, whether that grant was from the state or from a private person."

While the court does not in so many words say that a non-compliance with the statutory proceeding would render a taking of land by the state confiscation and not due process of law, yet that follows as a necessary corollary.

In the courts below, counsel claimed that the statute which provided an escheat procedure in the Territory was repealed, and the Court of Appeals fell into this error. If that were so, they would be in no better position since the common law was in force in the Territory, and if this statute were repealed, such common law would be in full effect as no other procedure was substituted for the one which they say was abolished.

But this statute which prescribed a procedure for the escheats never was repealed. The statute of 1854 provided that an information should be filed by the prosecuting attorney in the district court "whenever any property shall *escheat or be forfeited* to the territory for its use." The law of 1862 to which counsel refer was a revision of the Civil Practice Act, and when it came to this subject matter (Section 519 of the later act) it simply left out the words "*escheat or*," leaving the law to read "whenever any property shall be *forfeited* to the territory for its use." Technically there is a difference between the meaning of the words "escheat" and "forfeiture," though the word "forfeiture" as used in the vernacular includes both. The Supreme Court of Montana in *Territory vs. Lee*, 2 Mont. 124, and this Court in *Church, etc., vs. United States*, 136 U. S. p. 1, use the words as though they were synonymous, and so do many of the other courts. If this court holds that the word "forfeiture" is broad enough to include both, then of course the Act of 1862 is simply a repetition, a re-enactment of the law of 1854, and this doubtless is what the legislature meant. Counsel in their former brief (page 54) said: "An escheat is not a forfeiture, nor analogous thereto." If they are right in this statement, then the statute of 1862 does not deal

with the subject of "escheats" at all, and therefore as it is silent in regard to that subject matter, certainly does not repeal the previous matter on that subject passed in 1854. There is no specific repeal of the law of 1854, and the repealing clause which they cite does not in any manner help them. It reads: "All acts or parts of acts heretofore enacted upon any subject matter contained in this act, be and the same are hereby repealed." This does not designate any specific acts, but still leaves it open to construction as to whether the act in question or previous acts refer to the same subject matter or not. If the word "forfeiture" in the act of 1862 is broad enough to include escheats, then it was simply a re-enactment of the law of 1854. If it is not broad enough to include escheats, then the subject matter of "escheats" is not contained in the act, and therefore it does not repeal any previous law upon that subject, and the law of 1854 still remains in full force. But supposing that the law of 1862 by implication did repeal the law of 1854, it would then leave the common law in force in the territory and the county would find itself in the same position, in that, an inquest of office would be necessary.

And none having been had, the property has been taken without due process of law.

For the six reasons above given, we claim that the proceedings in the territorial probate court were in legal effect an absolute nullity, and constituted no judgment, decree or adjudication upon which any rights could be based. It was simply a void judgment, and it is not out of place for us in this connection to cite to the court the language of Freeman in his work on Judgments (4th Ed., Section 117) where he says:

"A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void." * * * "If it be null, no action upon the part of the plaintiff, no action upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislature or other department of the government, can invest it with any of the elements of power or of vitality."

IV.

THE STATUTE OF LIMITATIONS DOES NOT APPLY BECAUSE THE POSSESSION OF THE DEFENDANT IS NOT ADVERSE.

The control and possession of the county over the land in question in this case as shown on this record began by the county's having had the property stricken from the treasurer's rolls for purposes of taxation after the order of the probate court giving the same to the county, was entered, which was in 1869. The county did not make any specific use of this property for 16 years, and then in 1885, it occupied a portion known as the King County Farm, and began letting the same out to tenants for the purpose of producing a monetary income. In 1892, it platted a portion of the land under the name of "King County Addition to Seattle," and began selling off lots. In 1900, it began using a portion of the property for county hospital purposes. In 1903, it platted the remainder of the property, calling it "King County Second Addition to Seattle" and began selling off lots.

Under this state of facts we insist that the county *could not*, and *did not* have adverse possession as against the heirs of Lars Torgerson, alias John Thompson.

It *could not* have adverse possession against the heirs, because:

A. All possessory acts of the county infringed

the constitutional inhibition against taking private property for public use without just compensation.

B. All possessory acts of the county were *ultra vires.*

It *did not* have adverse possession against the heirs because:

C. The possession taken by the county recognized the title of the heirs.

D. The possession of the county was not under claim of right nor color of title.

A.

THE COUNTY'S POSSESSION WAS A TAKING FOR PUBLIC USE WITHOUT JUST COMPENSATION.

We believe we have shown conclusively that the property in question never escheated to the territorial County of King, and also that the probate proceedings assuming to give the property to the county, were an absolute nullity. The demurrer admits that the county has absolutely no paper title unless it be the order of the probate court. So this leaves the county with no title except the one which it may derive from the mere fact of posses-

sion under the accompanying circumstances as they are shown in the complaint in this case.

Our first contention in this connection is that the county had no power to appropriate to itself the private property of individuals, unless it were either by purchase or condemnation, accompanied with a rendering to the person whose property is taken, a just compensation therefor. All functions of the county are governmental and are acts of the government performed through the county. The government to which the territorial county was subservient as the sovereign power was the United States, and all acts of the county were the acts of the United States. The Fifth Amendment to the United States Constitution contains this inhibition as to the taking of private property.

In support of our position that the acts of a *quasi*-municipality like the county, are those of the government, we refer the court to the language used in the case of *Madden vs. Lancaster County*, 65 Fed. 188-191, where it is said:

"Cities and municipal bodies, that voluntarily accept charters from the state to govern themselves, and to manage their own local affairs, are municipal corporations proper." * * * "Counties, townships, school districts, and road districts are not municipal corporations proper." * * *

"The latter, even when invested with corporate capacity and the power of taxation, are but quasi-corporations, with limited powers and liabilities. They exist only for the purpose of the general political government of the state. They are the agents and instrumentalities the state uses to perform its functions. All the powers with which they are intrusted are the powers of the state, and the duties imposed upon them are the duties of the state."

In support of our position that the appropriation of property to its own purposes by a county is a violation of the inhibition contained in the United States Constitution, we refer the court to the opinion of one of the greatest lawyers the United States has ever produced, the author of the Commentaries on American Law, and who held the positions consecutively of Chief Justice and Chancellor of New York State, James Kent.

In the case of *Jackson vs. Cory*, 8 Johns, 385-388, the facts were that in 1791, a certain tract of land was granted to "The People of Otsego County," and the next year, in 1792, the county promptly erected upon the land a court house and jail. They held possession of such property for 15 years, until 1806, when under an act of the New York legislature authorizing the county to sell the property, it was deeded to the defendant in the suit, and he held possession some four or five years before the action was brought. The plaintiff claimed under

the original grantor to "The People of Otsego County," and insisted that the deed to "The People of Otsego County" was void because the county could not take as grantee under such description. The court held this deed void upon its face. The defendant also claimed that he got a good title from the county, because the county in 1806, had been authorized to sell the land. In this connection Chief Justice Kent said:

"Nor can the Act of 1806, authorizing the supervisors to sell the premises, be construed to divest the lessors of the plaintiff of their right. It is not to be presumed that the legislature intended to authorize the supervisors to convey anything more than the right and title which they might have had in the lot. The act was, no doubt, passed under the impression that the supervisors had a legal conveyance for the premises; and from the principles contained in the case of *Jackson vs. Catlin* (2 Johns. Rep. 248), and which has since been affirmed in the court for the Correction of Errors, conveyances by statute are not to be construed to pass any other or different right than that which the party before possessed. To take away private property by public authority, even for public uses, without making a just compensation, is against the fundamental principles of free government; and this limitation of power is to be found, as an express provision, in the Constitution of the United States."

When the county took possession and control of this land under what we can admit was an hon-

est but a mistaken impression that the land had escheated to it, that act and every act which has been done by it or its officers or agents ever since, in continuing that possession, has been in contravention to the inhibition contained in the United States Constitution against the taking of private property for public use without just compensation; and consequently every such act has been null, void and of no legal effect, and could have no legal vitality which would enable it to constitute the basis of a possessory title.

Such acts and all possession predicated thereon, could not be adverse to the Thompson heirs, because they were forbidden by law.

When possession or control of land is taken, the circumstances existing at that time give character to the possession and such possession does not change unless there is a complete disseisin of the premises, and the taking of a new possession separate and distinct from the original one. All acts done by the present defendant in continuing the possession which it received from the territorial county, are as much in contravention to the constitutional inhibition, as were the acts of its predecessor. Moreover, the defendant being a county of the State of Washington, its acts since the organ-

ization of the state have also been in direct contravention of a like inhibition contained in the state constitution.

B.

THE COUNTY'S POSSESSION WAS *ULTRA VIRES.*

Upon the same principle which we have invoked in the application of the constitutional inhibition, claiming that the acts in contravention thereof are null and void, and therefore cannot be made the basis for property rights, we, likewise, invoke the doctrine of *ultra vires.* The right to take possession of lands as did the county in the case at bar for the mere purpose of owning them, and having at the time no use for them for any county purpose, was wholly unauthorized by law and out of such possession no possessory title could arise, nor could such illegal and improper possession be held to be adverse to the real owner so as to enable the defendant illegally in possession of the property to set up such possession under the bar of the statute of limitations.

This position for which we contend is clearly

laid down in the case of *Williams vs. Lash*, 8 Minn. 441-446, in the following language:

"A county is a body politic, having a corporate capacity only for particular, specified ends and purposes, and is termed by legal writers a quasi corporation, that is having corporate attributes *sub modo*. 2 Kent. Com. 314. And the same author states, that the modern doctrine is to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any others. (2 Kent Com. 350.) This principle has been established and affirmed by numerous and uniform decisions in the United States and state courts, so that at this day it stands unquestioned, and the only difficulty that can arise with regard to it is to determine its applicability to the particular case in hand.

And, first, as to the powers of counties as expressly granted, defined and limited by statute at the time of the purchase of this real estate by the county of Ramsey, February 19, 1858. Sec. 251, Comp. Stat. 109, provides that 'each county shall continue to be a body politic and corporate for the following purposes, to-wit: To sue and be sued; to purchase and hold for the public use of the county lands lying within its own limits, and any personal estate; to make all necessary contracts; and to do all other necessary acts in relation to the property and concerns of the county.' Some other provisions with regard to the power of county commissioners, having no bearing upon the question under discussion, need not here be cited.

It is to this enumeration of the powers of counties that we must look for the authority claimed by

the county, or on its behalf, to purchase the lands in question. The second paragraph is the only one conferring express power upon the county to purchase and hold real estate. That limits the power of the county to the purchase of such lands only, as are for the public use of the county, and lying within its own limits. It will be observed by reference to the act of February 28, 1850 (Sess. Laws 1860, p. 131) that an additional grant of power was made, authorizing the county to purchase lands sold for taxes. The 'public use' by the county, mentioned in the statute, must mean that actual use, occupation and possession of real estate, rendered necessary for the proper discharge of the administrative or other functions of the county, through its appropriate officers."

The powers of the territorial county of King are almost identical with those in the case last cited. They are found in the Act in Relation to Counties, passed in 1854 (Sess. Laws 1854, p. 329) and are as follows:

Sec. 1. Be it enacted by the Legislative Assembly of the Territory of Washington, That the several counties in this territory shall have capacity as bodies corporate, to sue and be sued in the manner prescribed by law; to purchase and hold lands within its own limits; to make such contracts and to purchase and hold such personal property as may be necessary to its corporate or administrative powers, and to do all other necesasry acts in relation to all the property of the county."

It was not within the power of the county in 1869 to take possession of this land, and having done so improperly and illegally, its act is null and void and of no legal effect, and no property rights can be predicated upon it.

C.

THE COUNTY'S POSSESSION RECOGNIZED THE TITLE OF THE HEIRS.

We have, as we believe, above demonstrated that the proceedings of the territorial probate court were a legal nullity, and upon them could be based no rights of any kind; but as written documents, they have an evidential value in so far as they show what was done. A plain and simple receipt for money creates no contractual obligation, but it is evidence of the highest character of the fact which it states, namely, that one person paid to another money. Had the county commissioners at the time the Thompson estate was closed in 1869 set up upon the county farm a monument on which were engraved the circumstances under which the county assumed to take possession of the land, and what its claims in that respect were, such monument with its inscriptions would be the very high-

est class of evidence to prove the facts which were stated. And thus, although no monument has been erected, the county commissioners of that day and their attorney went before the probate court of the territory and there did certain things and spread upon its records certain documents and papers and procured the probate judge to spread upon its records under the guise of orders and decrees, certain statements of facts which have thus been carefully preserved for use in the public archives, and although the things they did, and the things they said, and the things they procured the judge to say, had no vitality or force as judicial proceedings, still they are proper evidence of the highest type to prove what the county officials did, and what they said as evidencing the circumstances under which they took possession of the land in question, and thus give character to that possession.

Looking once more at the proceedings in the territorial probate court, we find that they were begun in March, 1865, immediately after Thompson's death. On May 26, 1868, a little more than three years later, the county commissioners of King county appear upon the scene with a sworn petition in which they state that they believe there is a large sum of money in the hands of the adminis-

trator, and no heirs have appeared to claim the same; that King county is entitled to the balance in the administrator's hands, and praying for an accounting and payment of the balance to the treasurer of King county. Here at the outset the county claims what is in the administrator's hands, because there are no heirs, thereby impliedly admitting that if there were heirs their title would be better than that of the county.

On the day last mentioned, the court issued a citation commanding the administrator to appear, in which citation it is recited that the county commissioners desired to have the residue of the estate paid over to the county.

On July 27, 1868, the administrator filed an answer to said citation, and in it stated that a certain Mr. Wold, in behalf of the countrymen of John Thompson, had requested to have the matter held up to ascertain the whereabouts of the heirs of Thompson, as such countrymen of his were well assured that heirs were living in Sweden; and the administrator asked to have the matter go over until another term of court, and if no word was then had of the heirs he would turn over the property and effects to King County.

So that in response to the citation which they

had procured, the county commissioners were informed that Thompson's countrymen thought they could find his heirs. This request was reasonable, as all parties knew that if they could be found the heirs had the better title, and so the matter went off until the fall of that year.

On October 29, 1868, John J. McGilvra filed an affidavit in the Court in which he stated he had been hired by the county commissioners to place the estate of John Thompson in such a position that the county, "to whom said estate by law escheats," may have the full benefit thereof. He then proceeds to make excuses for not having attended to the matter before, and asks for certain relief, referring to other matters. On February 10, 1869, the county filed its petition to have the administrator removed, giving seven different reasons therefor, four of which were in reference to his improper management of the real proprty of the decedent. Here the county once more shows that it is taking an active interest in this estate and is expecting to obtain the same in case no heirs are found.

On February 12, 1869, the administrator filed a petition to have the estate finally disposed of in the course of which he states "that no heirs at law

of the said John Thompson have been found after diligent search and effort," and prays that he may be allowed to turn the residue of the estate over to King county. In pursuance of this petition, the court entered an order for all parties interested to show cause in connection with the settlement of the estate, and this order was published four weeks in a newspaper. As we have before stated, this order said nothing about escheat, but said that the estate was "to be divided among the heirs of said deceased according to law."

On May 26, 1869, the final decree discharging the administrator and assuming to distribute the estate was entered. In this decree it is recited that Thompson died intestate, leaving no heirs surviving him, and also "there being no heirs of said decedent, that the entire estate escheat to the county of King in Washington territory." Such decree then proceeds to adjudicate that the whole estate of Thompson "be and the same is hereby distributed as follows, to-wit: The entire estate to the county of King in Washington territory." Then follows a portion of the decree approving the acts of the administrator and discharging him. Then follows a description of what composes the residue of the estate, which is referred to in the decree, and it

mentions (1) certain cash, (2) the real estate in question in this case, and (3) a claim for rents reserved under a lease.

It will thus be seen that the county claimed this property because it believed that the same escheated, and that it was entitled to escheated property. This fact that such was its claim is shown clearly and explicitly in the documents which the county commissioners and also which their attorney have spread upon these court records, and it is also shown clearly in these orders and decrees which were spread upon these court records by the judge at the instigation of the county and its attorney. Promptly upon the entry of this supposed decree of escheat, the county exercised its control over this property by having the same marked as exempt from taxation upon the treasurer's rolls, and 16 years afterwards took actual physical possession of the property, and began letting it out to tenants for monetary profit. What uses may have been made of it since by the territorial county, or the defendant, which was its successor, cannot matter. The territorial county of King took possession of this property under circumstances where it admitted that the title of the heirs of John Thompson was better than its title, if there were such

heirs, and the presumption of heirship never having been legally destroyed by proper escheat proceedings, the possession of the county has never become adverse. It plainly appears from these facts that the county never claimed any title or right of its own traceable from any source whatever save the right of the sovereign to take escheated property, a condition precedent to the existence of which right would be the non-existence of heirs, and it goes without saying that until the non-existence of heirs is legally established by formal escheat proceedings, no sovereign can take a title which would be adverse to such heirs. That a taking of possession of land under circumstances which recognized that there is a superior title, cannot be an entry upon which can be based adverse possession as against that superior title, is clearly held in *Port Townsend vs. Sears*, 34 Wash. 413, where the Court says:

"To constitute an adverse possession there must be not only an ouster of the real owner followed by an actual, notorious and continuous possession on the part of the claimant during the statutory period, but there must have existed an intention on his part for a like period to claim in hostility to the title of the real owner. (*Blake v. Shriver*, 27 Wash. 597.) Possession is not adverse 'if it be held under or subservient to a higher title.'" (*Bellingham Bay Land Co. v. Dibble*, 4 Wash. 764.)

Again in *McNaught-Collins Imp. Co. vs. May*, 52 Wash. 635, the Court says:

"It must be continuous and exclusive, of course, and under color of title or claim of right, in good faith; otherwise the claimant would simply be a common trespasser. This disseisin must necessarily and logically constitute the commencement of a new title working a change in the ownership of the land; the initiation of a title which will ripen into ownership. The possession must be an independent possession, and not subservient to a superior right or title. Then, if at some particular time there must be a disseisin which starts the new title in the claimant, when does that time arise under the theory announced in *Johnson vs. Connor?* When the claimant settles upon the land, believing it to be government land, his possession is subservient to the government. It is true, by observing the rules prescribed by the government, he may claim some rights under his possession when he comes to make formal application for the land. But in no sense could he be said to be holding possession adverse to the true owner at that time."

We take the liberty of analyzing the language of this case and applying it to the case at bar: "The possession must be an independent possession and not subservient to a superior right or title." In the case at bar the county's possession was not an independent possession. On the contrary, it was absolutely dependent upon the non-existence of heirs, and if heirs did exist the county had no title whatever. "When the claimant settles upon the land believing it to be government land his possession is subservient

to the government." When the county settled upon the land believing it to belong to the Thompson heirs, if there were any, its possession was subservient to the title of such heirs. "It is true by observing the rules prescribed by the government, he may claim some rights under his possession when he comes to make formal application for the land." It is true, by observing the rules and laws prescribed by the Territory, the county might have claimed some rights under its possession when it took formal escheat proceedings to terminate the presumption of heirship. "There is no hostile possession adverse to the true owner at that time." In the case at bar, at the time the county took possession, it was not hostile or adverse to the heirs, for the county well knew that their title was the better, and as it was chargeable with knowledge of the law, it knew that the title of the heirs could not cease until escheat proceedings had been taken.

The following cases also sustain this proposition, and we do not believe there can be found any to contravene it:

"To show conclusively that adverseness is universally regarded as a question of law, and not of fact, the books proceed to discuss the circumstances under which possession would be held to be adverse or otherwise, as, for instance, it is held that posses-

sion will not be adverse if it be held under or subservient to a higher title."

Bellingham Bay Land Co. v. Dibble, 4 Wash. 764-7.

"A possession in order to be adverse must be accompanied with a claim of the entire title. If it appears that the title claimed is subservient to, and admits the existence of, a higher title, the possession is not adverse to that title."

Jackson v. Johnson, 5 Cow. 74-92.

"It is repugnant and absurd to lay a demise in the names of persons as heirs of the person last seized, when the action is brought upon the assumption that the land escheated for want of such heirs."

Catham v. State, 2 Head. (Tenn.) 553.

"Assuming the truth of all that the answer contains, and construing all that is there asserted most favorably for the defendant, it comes far short of establishing a possession adverse to the true owner. To constitute such a possession there must be a claim of title and the claim must be of the entire title. It must be such as necessarily to exclude the idea of title in any other person. 'When a plaintiff has shown title, and the defendant relies on possession, the idea of right is excluded; the fact of possession, and the *quo animo* it was commenced and continued, are the only tests; and it must necessarily be exclusive of any other right. This doctrine has often been repeated. Let me ask what is meant by the *quo animo*. Is it an intent to take possession of another man's land, knowing it to be so, and make it his own by 20 years' possession? This will not be pretended.

Such an entry would be a mere trespass, and the person so trespassing with no other pretense or color of title will always be a trespasser. The *animo*, then, or the intent with which the entry is made, must be *bona fide* an entry, believing, in good faith, that the land is his and he has the title.' (*Livingston v. The Peru Iron Co.*, 9 Wend. 511.) If it appears that the title claimed is subservient to, and admits the existence of, a higher title, the possession is not adverse. (*Smith v. Burtis*, 9 John. 180. See also *Jackson v. Johnson, supra.*)"

Howard v. Howard, 17 Barb. 663-667.

"To render possession adverse, so as to set the Statute of Limitations in motion, it must be accompanied with a claim of title; and this claim, when founded 'upon a written instrument as being a conveyance of the premises,' must be asserted by the occupant in good faith, in the belief that he has good right to the premises, and with the intention to hold them against all the world. The claim must be absolute—not dependent upon any contingencies—and must be 'exclusive of any other right'; and to render the adverse possession thus commenced effectual as a bar to a recovery by the true owner, the possession must be continued without interruption, under such claim, for five years. When parties assert, either by declarations or conduct, the title to property to be in others, the statute cannot, of course, run in their favor. Their possession, under such circumstances, is not adverse."

McCracken v. City of San Francisco, 16 Cal. 591-637.

It seems to us that the fact that the county took possession of the land with full knowledge of the

rights of the heirs and subject to those rights whatever they were, appears so clearly in this case that it is beyond dispute. That the possession so taken could not be adverse to the heirs seems also as a matter of law entirely beyond dispute.

D.

THE COUNTY HAD NO CLAIM OF RIGHT, NOR COLOR OF TITLE.

No possession is adverse in such a manner as to constitute a bar under the statute of limitations, unless the same is based either upon a claim of right or color of title, accompanied with an intention to oust or disseize the previous owner.

The county never had any intention to oust or disseize the heirs of John Thompson, because their taking possession was predicated upon the supposed fact that there were no such heirs. The county itself in the probate proceedings participated in declaring there were no such persons, in fact based its claim upon their non-existence, and so could not as a physical possibility have intended to hold against them. There was certainly no intention to oust in this case.

The county did not have any claim of right in this property. It appears clearly and affirmatively just what was the claim of the county, and, such being the fact, no other basis of claim can be presumed or imagined. Its claim was that the title of John Thompson had ceased for lack of heirs, and that it being by law the successor to the United States as sovereign in the matter of escheats, it took the title of the United States which accrued by reversion. If, then, as a matter of law, no reversion took place, and the title of John Thompson did not cease, then the county had no claim of right whatever. The county is a municipal corporation or artificial person and cannot actually think. Its thoughts are only such things as can be inferred from the acts of its officers and agents when they are given their proper legal effect under the law, and only such claims as it has, can it think it has.

One of the heirs of John Thompson, representing himself and the claims of the other heirs, is here demanding the property, and as the only right the county ever claimed was a right to the property if there were no such heirs, it cannot assert against them some claim that it did not make at the time it took possession of the land.

The county has not got color of title. All docu-

mentary, paper or record title of the county is negatived in this case unless the probate decree can be accounted as such. As we have above shown, for numerous reasons this probate decree is an absolute nullity for the purpose of creating legal rights or conveying any title to this land. But irrespective of how or why this decree may have been procured or come into existence, when we look at the document carefully it absolutely has none of the elements of color of title. It is not a conveyance. It does not purport to convey title; if so, whose title? Certainly not the title of the heirs of John Thompson, for it says there are no such persons. Certainly not the title of John Thompson, because it distributes the property to the county upon the very ground that the title of John Thompson had ceased. It is not a decree of distribution, for such a decree could only give title to those claiming under the decedent. What is it, then? It is simply an awkward and illegal attempt of the probate court to convert the proceedings established by law for the distribution of an estate into an escheat proceeding. An escheat proceeding, if prosecuted to judgment, would not even be color of title. The judgment of escheat would simply destroy the presumption of heirship, and the title would revert by operation of law, being founded upon the original title of the sovereign and

not upon any rights acquired under the escheat judgment. This improper attempt to escheat this property certainly cannot constitute color of title even if the court had not been without jurisdiction of the entire subject matter. Upon its face, this decree assuming to give this property to the county is a proceeding unknown to the law, and therefore cannot be color of title or constitute any other evidence of title.

In *Yesler Estate vs. Holmes*, 39 Wash. 34-36, the court says:

"On this subject the court, in substance, instructed the jury that, under our statute, the rightful owner of real property is seized of the same, whether he is in possession or not, and that disseizin can only occur where there is an adverse and hostile entry; that an entry to constitute an adverse or hostile entry must be under a claim of right, made for the purpose of dispossessing the owner and that an entry on the land of another, under a mistaken, though honest, belief that such lands are public lands and subject to entry, would not work a disseizin of the true owner." * * * "Under the rule of these cases, a mere naked possession is not sufficient to constitute adverse possession under the statute. Possession, to be adverse, must be actual, open, notorious, continuous, and under a claim of right or color of title."

In the above case, the court says "That an entry on the lands of another under a mistaken, though honest, belief that such lands are public lands and

subject to entry would not work a disseizin of the true owner." Escheated lands are public lands and they are subject to entry by the sovereign or its representative, though such entry cannot mature into a title until office found. So applying the language of this case to the case at bar, an entry upon the lands of the heirs under a mistaken though honest belief that such lands were escheated lands and subject to entry would not work a disseizin of the heirs.

As holding that the possession of land is not adverse unless there is an intention to oust the true owner, and a claim of right or color of title, we refer the court to the following cases:

"The uniform rule is that possession will not ripen into title unless such possession is exclusive, open,notorious, adverse, and under the above authorities, under a claim of right."

Wilcox v. Smith, 38 Wash. 585-590.

"Without especially reviewing all the cases cited by either the appellants or respondents, the overwhelming weight of authority seems to be that the basis of an adverse possession is a claim of title or right. An entry can only be made by the seizin of the claimant, or by an ouster of the owner of the freehold. There must be a disseizin before another

can become legally possessed of the lands, and this, of course, can only be done by some act which works a disseizin of the original owner, for the seizin cannot abide in two claimants at the same time. And as the statute of limitations will not commence to run until this seizin, it becomes necessary to determine what acts will constitute a disseizin or dispossession of the original claimants. First, there must be an intention; that is, an entry for the purpose of dispossessing the owner. That intention, of course, must be determined by the acts of the usurper; and before the right of the owner could be extinguished, and his divestment established, and an investiture created for the usurper, there must, of necessity, be an adverse possession on the part of the new claimant. And while it is true that the statute provides that no action shall be maintained unless the plaintiff has been possessed within ten years, yet the question of whether or not the original owner is so disseized must of necessity, in a case like this, depend upon whether or not there has been an adverse possession of the defendants during the statutory period. For the disseizin can only occur where there is an adverse or hostile entry. This court has said in *Bellingham Bay Land Co. vs. Dibble*, 4 Wash. 764 (31 Pac. 30), that the entry must be under claim or color of title, or it would not ripen into title. And

it was also said in *Balch vs. Smith*, 4 Wash. 497 (30 Pac. 648):

" 'In our opinion our statute of limitations is like that of most other states, one of adverse possession, and under it the rightful owner of real estate is seized of the same, whether or not he is in actual possession thereof, unless the same is in the actual adverse possession of some other person. This being so, it follows that when ownership and seizin is once shown it will be presumed to have continued until such presumption is overcome by allegation and proof of adverse possession in someone else.' "

Blake v. Shriver, 27 Wash. 593-596.

"In this state possession of real property, to be adverse, must be actual, open, notorious, continuous, and under the claim of right, or color of title. Mere naked possession is not sufficient" * * * This record does not disclose such a possession as the rule announced in these cases requires. While the possession shown has been sufficiently long, open, notorious, and continuous to ripen into title for at least a part of the land in dispute, it was not shown to have been either under a claim of right or color of title, and without one or the other of these essentials, possession, no matter how open and notorious, or how long continued, can never ripen into title.

Lohse vs. Burch, 42 Wash. 156-160-161.

For the foregoing four reasons, every one of which we believe to be well taken, we insist that the possession of the county was not adverse to the heirs of John Thompson, and therefore the protection of

the statute of limitations cannot be invoked by the defendant.

V.

OPINION OF THE CIRCUIT COURT OF APPEALS.

It now becomes our duty to comment upon the opinion of the Circuit Court of Appeals in this case. That court assumes to decide four questions and we will take them up *seriatim.*

First.

The Court of Appeals opens its opinion with the question:

"The main question to be determined is the jurisdiction of the Probate Court of King County at the time it entered the decree escheating the estate of John Thompson in favor of the defendant. Had the Court jurisdiction to enter that decree?"

The court then cites from the act of Congress of March 2, 1853, establishing the territory of Washington, that portion (Sec. 4) which created the Legislative Assembly; that portion (Sec. 6) that conferred the power of legislation upon the Territory, and that portion (Sec. 9) creating the Courts

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of the Territory including the Probate Court. The court then refers to the territorial Probate Act, originally passed in 1854, and somewhat modified and enlarged in 1863, and cites that portion (Sec. 3, Chap. 1) which defines the power of the Probate Court, those mentioned being purely probate functions and not mentioning the subject of escheat; that portion (Sec. 4, Chap. 1) providing the court shall keep a seal; that portion (Sec. 5, Chap. 1) requiring the court to keep records and giving it power to issue writs; that portion (Sec. 10, Chap. 1) providing that process shall be attested by the clerk and properly sealed, and served in same manner as process from the District Court; that portion Sec. 317, Chap. XVI.) providing that upon settlement of final accounts, upon application of any party in interest, the court shall distribute the estate among the persons who are by law entitled; and that portion (Sec. 318, Chap. XVI.) providing that in its decree the court shall name the persons, and the portions to which they are entitled, and such persons shall have right to demand and recover their respective shares.

The court then says:

"The provisions of the statute gave the Probate Courts full power and authority within their re-

spective counties of the subject matter of probate proceedings in the administration of the estates of deceased persons." (Trans. 47 and 48.)

This conclusion, of course, no one would have the hardihood for a moment to dispute. This is all that the court says in answer to its original question, "Had the court jurisdiction to enter that decree"? It does not undertake in any manner to apply the statutory law that they have quoted, to the facts of the case at bar, nor point out how the provisions, which they have referred to, in any manner gave the Probate Court jurisdiction over the matter of Escheats.

Without analysis or explanation the court concludes:

"In this case it appears affirmatively from the record that the proceedings were in substance in conformity with the statute and in our opinion they gave the court jurisdiction of the subject matter." (Trans. 48.)

It cannot be told just what the court means in this last statement by the phrase "subject matter"; whether the subject matter of Probate Distribution or the subject matter of Escheat, but, whichever it is, certainly their conclusion is inaccurate.

If the subject matter referred to is the exercise of probate functions then the court did not have

jurisdiction, because the only pretended petition for letters of administration upon which the proceedings were based, was a written request from a couple of strangers to the court to appoint another stranger administrator. It was defective in law, in that it failed to state the decedent's residence, the existence of assets, the *situs* of assets, the intestacy of the decedent and the right of the appointee to the appointment. It was defective in all these respects, each one of which has been held a fatal defect in the authorities which we refer to above, and which are contained in Vol. 18 of Cyc. page 122. The probating of an estate is a proceeding *in rem*, and the petition which starts the proceeding is what gives jurisdiction, and if it does not comply with the law, the whole of the proceedings are null and void.

The same reasoning and the same rules of law apply to the order appointing the administrator, and in the case at bar that was equally defective. Just as we have done in this court, we in that court called attention to these defective proceedings and cited the law in support thereof. Opposing counsel did not and cannot point out how the proceedings in this case could possibly fit the requirements of the statute, nor could they produce any authorities to contravene those which we cited. We believe our argu-

ment in this respect to be unanswerable, but the Court of Appeals wipes it out without reasons or explanations being given, by the mere assertion that the proceedings were in conformity with the law.

If the subject matter referred to is the exercise of escheating functions, then there are a number of reasons we gave that court, and have above given this court, why the Territorial Probate Court did not have jurisdiction thereof.

The Organic Law which the Court of Appeals cites does not define the jurisdiction of the courts, save to designate the one in question as the "Probate" Court. This description standing by itself would confer none but probate functions.

Next, the Probate Act of the Territory which defines the jurisdiction of the Probate Court and which is cited by the Court of Appeals does not mention escheats.

Next, the only provision in the Territorial laws in reference to what shall become of escheated property is what is found in the Territorial Probate Act, which in its title states that its purpose is to define the jurisdiction and practice of the court, and the mention it makes of escheats is entirely outside of the scope of its title. The Organic Law of the

Territory contained the common provision that every act passed should have but one object and that should be expressed in the title. To this contention of ours there has not been and cannot be made any answer. The Court of Appeals does not mention it.

Next, the proceedings which were had in the Territorial Probate Court were not due process of law. The authorities which we have cited to this court upon that subject, including the decision of this court in *Hamilton v. Brown*, 161 U. S. 261, were presented to the Court of Appeals, but it does not mention the matter.

All these reasons, which we have given, why the Territorial Probate Court could not exercise escheating functions the Court of Appeals wiped out, with the mere assertion that the proceedings were in conformity with the law.

Second.

The Court of Appeals Then says:

"The next question is, did the statute further provide a method of procedure whereby the court would obtain jurisdiction over all parties interested in such estates?"

The argument of the court in this behalf is a

begging of the question. If the proceedings of the Probate Court in their initiation had been carried on correctly there is no doubt that the subsequent proceedings were sufficient to give the court jurisdiction over all persons interested in the estate in connection with entering a final decree of distribution among the heirs of the deceased. But a distribution among the heirs of the deceased and an adjudication that there were no heirs and escheating the property are two totally different and distinct proceedings. We have above referred the court to Justice Gray's emphatic statement to this effect in *Hamilton v. Brown*, 161 U. S. 261, and to other cases which we have above cited. The Court of Appeals then proceeds to convincingly argue that a probate proceeding is one *in rem*, which no one would think of denying. It also points out that the preliminaries to the entry of the final probate decree were in accordance with the Territorial statute, and that a notice thereof had been properly published, but they failed to call attention to the fact that such notice ordered "that all persons interested in the estate of the said John Thompson, deceased, be and appear before the Probate Court"—"then and there to show cause why an order of distribution should not be made of the residue of said estate *among the*

heirs of said deceased, according to law." (Trans. 27.) The court then concludes:

"In our opinion the proceedings under the statute were sufficient to give the court jurisdiction over *all parties claiming interest in the estate.*"

If the sovereign claiming property because the title of the decedent has failed is claiming an interest in the estate, then the court's reasoning is correct.

It scarcely seems necessary to reiterate that the sovereign claims by reversion and not by succession.

Third.

The Court of Appeals then says:

"The next question is, did the Probate Court have authority to distribute the residue of the estate to King County by a judgment of escheat?"

In answer to this interrogatory the court discusses some questions which we presented to them, but we are unable to see any logical connection between the propositions they discuss, and we, with all due respect, insist that they answered each of the questions that they discussed erroneously. We will now take up these subsidiary questions of which they treated.

(a) The Court of Apeals admits the sovereignty of the United States in the Territory and that all unclaimed estates must revert to the United States, unless it has divested itself of its right of escheating, and placed the same elsewhere. The court does not in any manner point out how the United States has divested itself of this right.

The court says:

"Congress has never passed an act providing for escheating of estates, but has always left the matter with the Territory during the Territorial period, and with the States if the States had been formed. *Crane v. Reeder*, 21 Mich. 24, 75."

This language, though not in quotation marks in the opinion, is an exact quotation from the decision of the Michigan Court. The judge in the latter case was discussing the Territories of Ohio, Indiana, Illinois, Michigan and Wisconsin which had been formed from the Territory of Virginia Northwest of the Ohio River, and the States of the same names subsequently organized. He was therefore speaking of his State of Michigan and those states which formed a cordon around it, and he was not in any manner intending to state anything that would be applicable to other States and Territories of the Union which had been acquired in some manner different from the acquisition of the "Northwest Ter-

ritory." Why the court should have selected this case of *Crane v. Reeder*, and entirely overlooked the decision of this court in the Mormon Church case, and the other cases which we have above cited, which are exactly in point, we cannot tell, but certain it is, that the facts of the Michigan case are not in the slightest degree analogous to the case at bar, and the law therein laid down emphatically states that position for which we have contended, that it is the sovereign power which takes escheats. We refer the court back to the previous portion of our brief where this matter is discussed.

(b) The Court of Appeals declares that the validity of the Washington statute was recognized in *Territory v. Klee*, 1 Wash. 183, and *Pacific Bank v. Hanna*, 90 Fed. 72. In this statement the court is mistaken. As we have shown, in *Territory vs. Klee*, what is said upon this subject is merely *dictum*, but even that *dictum* says, "that if the Territory is the owner of the land, the rights vested in it immediately on the death of Gilbert, *without the aid or intervention of the Probate Court*, and in that case it can recover the possession of the land like any other owner *by an appropriate action in the proper court.*"

English language could not plainer state that

the court doubted whether land would escheat to the Territory, nor could it plainer state that if it would, it could not do so through probate proceedings, but should be by the utilization of the escheat procedure which was then in force in the Territory, and which the Court of Appeals itself quotes a little further along in its opinion. (Trans. 52.)

The other case which they cited, *Pacific Bank v. Hanna, supra*, is from their own court. In it the Territorial Probate Act as to Descents was construed, but nowhere was the question of the validity of that act mentioned or even hinted at.

It will thus be seen that of the two cases which the Court of Appeals cites to sustain their position, the first holds exactly the contrary, and the second does not pass upon the question at all.

(c) The Court of Appeals next calls attention to the fact that the Organic Act of the Territory vested it with all legislative power not inconsistent with the constitution and law of the United States. And the court then says:

"Territorial Legislation providing escheating of unclaimed estates in the Territory was not inconsistent with the constitution and laws of the United States."

This does not in the least cover the question

involved. What the territory did in this case was not to pass a law or rule of action for the control and guidance of its citizens, but was an attempt to confiscate and appropriate to itself and make a present to its counties of property rights which belonged to the United States. Under the authority we have above cited no such rule can be sustained unless there is express and specific authorization on the part of the United States given to the Territory to pass it. Instead of there being any such authorization, all that the laws of Congress say on the subject matter tends in exactly the opposite direction.

(d) The Court of Appeals next proceeds to hold that the passage of a Territorial law appropriating to the Territory the escheat rights of the United States is not an interference with the primary disposal of the soil in a manner forbidden by the Organic law. In this connection we simply again refer this court to the reasoning of Chief Justice Wade, in *Territory v. Lee*, 2 Mont. 124, whose reasoning on this subject we respectfully submit is much more logical than that adopted by the Court of Appeals in this case.

(e) The Court of Appeals next calls attention to the fact that in the act of Congress it was provided that all laws passed by the Legislative Assem-

bly should be submitted to the Congress of the United States, and if disapproved should be null and of no effect.

The court then says that they must presume the Territorial Escheat Law to have been thus submitted to Congress and not to have been disapproved.

This is indeed a peculiar construction of this language. What the act here does is simply to reserve to Congress a power to review and annul all Territorial laws, if it saw fit so to do, which reservation has always appeared in every Territorial Organic Act.

The Court of Appeals construes this into a permission to the Territorial Legislature to go ahead and violate all restrictions that had been laid upon it by the Organic Act, and that such violations and upsetting of the Organic Act would be perfectly valid unless Congress found out what had been done and repealed the Territorial Act which had in reality been forbidden before it was passed.

When Congress reserved to itself the right to review Territorial Law it certainly did not mean that such reservation should amount to a grant to the Territory to confiscate and appropriate to itself the property rights of the United States.

(f) The Court of Appeals then holds that the Territorial Act establishing a procedure for escheating property was repealed. In so holding it certainly has made a mistake, but as we have argued this at length above we will not repeat that argument here. However, if such act were repealed the Common Law would then have been in force in the Territory, and under that there would have been ample jurisdiction and a valid method of procedure in the District Court which was the Court of General Common Law and Chancery jurisdiction.

We respectfully submit that the Court of Appeals has not demonstrated that the Territorial Probate Court had a right to enter a judgment of escheat.

Fourth.

The Court of Appeals then says:

"We are of the opinion also that the statute of limitations is an effectual bar to this action."

In support of the opinion they thus express they call attention to the fact that prior to 1881, the statute of limitations referring to real actions in the Territory of Washington, had been twenty years, and since that date ten years. The Court then calls attention to the fact that 42 years have elapsed be-

tween the action of the Probate Court, under which the defendant assumed to take possession of the land in question, and the beginning of the suit.

The court then says:

"The allegations of the complaint as to certain acts of the defendant with respect to occupancy of the premises in controversy are not sufficient to stay the running of the statute of limitations, nor was the statute stayed by the allegation that neither the heirs of the decedent, nor the plaintiff, learned of the death of Grotnes, the place of his death, and the fictitious name which he had assumed, until within three years last past, and that since learning thereof, the heirs, and particularly the plaintiff, had been diligently engaged in searching for and procuring the proper proof of the identity of Lars Torgerson Grotnes and John Thompson, and his relationship to them."

The circumstances under which possession is taken of land and the acts of the occupant concerning the occupancy thereof certainly give character to the possession and show whether it is open, notorious, or hostile, or otherwise, but the Court of Appeals does not refer to what these acts, which are mentioned, are and why they are not sufficient to stay the running of the statute of limitations, but simply disposes of them with the bald assertion that they are not sufficient to accomplish that purpose. The court then refers to a paragraph which we inserted in our complaint which is harmless, but if the

motion had been made would have been properly stricken, because it was immaterial and irrelevant. That was a statement that the plaintiff and those he represented had only learned of their rights within three years and had since they learned thereof been diligently preparing their case. We heartily concur with the Court of Appeals when it holds that a Court of Equity could not grant relief against the running of the statute of limitations, and that a court of law could not do so in a suit of ejectment like the case at bar upon any equitable grounds. As we have above contended, this is a suit at law and neither equitable causes of action nor defenses can be invoked. At no time during the pendency of this action in either of the courts below nor in our foregoing brief have we, at any time, claimed any right, based upon the allegations of the complaint which are here referred to. In bringing it forth thus prominently the Court of Appeals has simply set up a straw man and then knocked him down. However, whilst the acts of the plaintiff could in no manner have a bearing upon this question, of the statute of limitations, the acts of the defendant most decidedly could. What these were the Court of Appeals does not mention, but simply said they could not have the effect of staying the statute.

How about the proposition, that for a municipality to take possession of private property without proper legal proceedings, being an act in contravention of the constitutional inhibition against taking private property for a public use without just compensation? This proposition is laid down by Chief Justice Kent, in *Jackson v. Cory*, 8 Johns. 385, which we have above cited. If this is correct then the county's act was illegal and could form no basis for a possessory title. The Court of Appeals does not mention this question, much less answer our contention in that behalf.

How about the proposition that the acts of the County in taking possession of this land were *ultra vires*, and therefore void and incapable of being the foundation of any rights in the nature of a possessory title? We have above cited respectable authorities to sustain that position, but the Court of Appeals does not notice them.

How about the proposition that the County took possession of this land in such a manner that it recognized the title of the heirs as superior to its own claims, and that consequently its possession as against them never became adverse or hostile? In support of this proposition we have above cited numerous decisions of the Supreme Court of the State

of Washington in which this land is located, and of course could have cited many hundreds more from other States of the Union. The Court of Appeals does not mention this matter, or attempt to contradict our position.

How about the proposition that the County had not either claim of right nor color of title to the land in question, when it took possession, and that, therefore, its possession was that of a mere trespasser and could never be the basis of a possessory title? We have above cited numerous cases from the Supreme Court of the State of Washington holding this proposition, and could have cited hundreds more from different States of the Union. The Court of Appeals does not mention this proposition, nor does it in any manner contradict our contention in this behalf.

Every one of these four propositions of ours is logical, and sustained by authority, and decisive upon the invocation of the statute of limitations by the defendant in this case, and still they are wiped out by a mere assertion that they are of no importance, without either logic or authority to show that they are not worthy of consideration.

We respectfully submit that the opinion of the Circuit Court of Appeals in this case in the four

questions that it asked and assumed to answer, has failed to show that it was justified in answering them as it did. Moreover, that court has totally overlooked and passed by unnoticed many of our contentions, any one of which, if they are well taken, would be decisive of this case in our favor.

CONCLUSION.

Our assignments of error (14 in number) cover every proposition which we think the Court of Appeals erroneously held or refused and failed to hold. Had we taken them up in their order it would have simply caused confusion and endless repetition, and so we have presented our case in what seemed to us the simplest and clearest arrangement of the legal propositions involved.

We believe that we have shown many good reasons which conclusively establish the four propositions for which we have contended, namely:

I. No facts on which to base laches and estoppel are shown in the complaint, nor could they be set up as defenses to this action.

II. The territorial County of King, to whose title, if any, the defendant succeeds, never acquired any title to the land in question by escheat.

III. The proceedings in the territorial probate court were in legal effect an absolute nullity.

IV. The statute of limitations does not apply because the possession of the defendant is not adverse, nor under claim of right nor color of title.

Such being the case, this cause should be reversed and remanded to the district court with instructions to overrule the demurrer to the amended complaint, and proceed with the action according to due course of law.

Our client's cause is righteous. He is claiming for himself and his co-heirs, the property which rightfully belonged to their ancestor, Lars Torgerson. If it has become valuable, both legally and morally they are entitled to the unearned increment produced by the growth of the city of Seattle and the State of Washington. The county never paid a dollar for the land, and has no legal or moral claim to it. It simply found it vacant and attempted to appropriate it. What improvements it has placed upon the same, we are not seeking to take from it, for though a portion of them would be legally ours, none of them would be morally. We expect that counsel will repeat the argument which they made in the courts below, that public policy forbids depriving

a municipality of such valuable property, and that the court should sustain the demurrer because it would cost the county so much to defend the suit upon the merits. The only comment that we will make upon this style of argument is to quote to this court the language of Stephen J. Field, then Chief Justice of California, in *McCracken vs. City of San Francisco*, 16 Cal. 633, in a case involving approximately a half million dollars, as does the one at bar, where he said: "Be this, however, as it may, it can have no weight in the determination of the case. It is our duty to pronounce the law, and with the consequences which follow we have nothing to do—whether they be to cast upon the city a liability of one dollar or of a million."

Respectfully submitted,

LIVINGSTON B. STEDMAN,
EDWARD JUDD,
S. S. LANGLAND,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States

THOMAS CHRISTIANSON,
Plaintiff in Error,
vs.
THE COUNTY OF KING.

No.....

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION TO DISMISS WRIT OF ERROR
and
BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE BY THE DEFENDANT IN ERROR.

This was an action brought by plaintiff in error in the District Court of the Western District of Washington, Northern Division, to recover certain real property from the defendant and to quiet plaintiff's title thereto.

Plaintiff in error has pleaded the source of the county's title to the land. A demurrer was

filed by the defendant, argued, and sustained. An amended complaint followed, to which the demurrer was again sustained. Plaintiff elected to stand on the pleadings, and the case was dismissed. From that decree, plaintiff took the case, by writ of error, to the Circuit Court of Appeals for the Ninth Circuit, where the decree was affirmed. The case is brought here by writ of error.

The property involved in this litigation is situated in the City of Seattle, King County, Washington, and was owned by one John Thompson at the time of his death in 1865. Creditors applied to the Probate Court of King County, Washington Territory, for an administration on his estate. Letters of administration were duly issued to one Daniel Bagley, who, under the direction and supervision of the Probate Court, proceeded to administer the estate. The record indicates that Thompson left, in addition to his real property, certain money and other personal property.

It appears from the plaintiff's amended complaint that in 1869, the County Commissioners of King County directed the Prosecuting Attorney to move in the Probate Court for an order escheating the estate to King County on the ground that

Thompson died intestate, and without heirs and that more than four years had elapsed since his death, and no one had appeared to make claim to the property. Proper proceedings on this application were taken, and an order was duly signed by the Probate Judge, citing all persons interested, or claiming any interest, in the estate to appear and show cause on the day named why distribution should not be made in accordance with law. Notice of this show cause order was published in a newspaper of general circulation in King County and posted as required by the statute. No person appeared in answer to the citation to lay claim to the estate, and the probate court entered a finding that John Thompson died intestate, and without heirs. A decree was entered escheating his estate to King County.

At the time of John Thompson's death, in 1865, the property had but little value. The probate records, contained in the amended complaint, show that it was appraised at twenty-five hundred dollars. Since that time, however, the City of Seattle has grown up around it, and plaintiff in error alleges, and admits, that it is now worth more than three hundred thousand dollars. It ap-

pears from the complaint, that a portion of it (not included in this action) has been platted by King County and sold to third parties, and that the county has built buildings upon another portion, and is now in possession and is using the same as a County Hospital and Poor Farm. Since the decree of escheat was entered, the property has not been taxed by either the county, territory or state on the theory that it belonged to the county, and as public property was exempt from taxation.

It is alleged that John Thompson's true name was Lars Torgeson Grotnes; that he was born in Porsgrund, Norway, in 1829, coming to America as a sailor; that he deserted his vessel in San Francisco in 1856 because of ill treatment and then came to Puget Sound. In order to prevent detection, he changed his name to John Thompson, and subsequently acquired the property involved in this litigation.

MOTION TO DISMISS WRIT OF ERROR.

The defendant in error moves to dismiss the writ of error and suggests the following grounds:

1. The decision of the Circuit Court of Appeals in this case, affirming the decree of the Dis-

trict Court against the plaintiff cannot be reviewed in this court on writ of error, since jurisdiction in the lower court depended entirely upon the diverse citizenship of the parties.

2. Assuming, but not admitting, that plaintiff's amended complaint sets up additional grounds of federal jurisdiction, the same depended in the first instance entirely upon diverse citizenship, and the decree of the Circuit Court of Appeals, plaintiff having taken his case there for review, became final in the action.

3. Regardless of the pleadings, there is no federal question in this case, except that of diverse citizenship. The other grounds claimed are so remote and unfounded that the case cannot turn upon the construction given to the constitution or statutes cited. The decision must rest upon the territorial probate statutes and general statutes of limitation.

DISCUSSION OF THE MOTION.

Plaintiff, a citizen of Norway, suing as the heir at law of John Thompson, deceased, attacks the validity of the decree of the probate court of Washington Territory in his original complaint,

(T. page 4) with the following allegation:

> "That said decree was null and void, and said Probate Court was wholly without jurisdiction to in any manner vest, transfer, convey, fix or pass upon the title to the land described in said decree, and has no power or authority to declare said land escheated, which is the same land as above described."

This is the only ground alleged in the original complaint as an attack upon the county's title; it does not present an issue calling for the construction of either the constitution of the United States, or of any federal statute. So far as the original complaint is concerned, jurisdiction in the District Court depended entirely upon the diverse citizenship of the parties.

Hanford vs. Davies, ~~196~~ 163 U. S. ~~271~~, 41 L. Ed. 157.

The county further claims that plaintiff's amended complaint fails to set forth any further ground of federal jurisdiction.

In addition to the charge of invalidity made in the original complaint against the decree of escheat, the plaintiff's amended complaint (T. page 19) states and sets forth the following:

"That the controversy in this action involves a subject of a foreign government, and a citizen of the State of Washington and of the United States of America; that the matter in dispute and controversy in this action, exclusive of interests and costs, exceeds in value the sum of three hundred thousand ($300,000) dollars;

"That the controversy in this action involves the construction of that portion of Amendment V to the Constitution of the United States, which provides that private property shall not be taken for public use without just compensation.

"That the controversy in this action involves the construction of those parts of Amendments V and XIV to the Constitution of the United States, which provides that no person shall be deprived of property without due process of law.

"That the controversy in this action involves the construction of the act of the United States Congress, which established the courts of the Territory of Washington, creating, among other tribunals, the probate courts of said Territory, being Section 1907 of the Revised Statutes of the United States of 1874.

"That the controversy in this action involves the construction of the act of the United States Congress vesting the legislative power of the Territory of Washington, and providing

that no law shall be passed by the Territorial Legislature interfering with the primary disposal of the soil, being Section 1851 of the Revised Statutes of the United States of 1874.

"That the controversy in this action involves the construction of the act of the United States Congress restricting legislative power of the Territory of Washington, providing among other things that every law shall embrace but one subject, and that shall be expressed in the title, being Section 1924 of the Revised Statutes of the United States of America of 1874."

The defendant in error claims the foregoing allegations insufficient to confer jurisdiction upon this court because they do not point out what title, right, or privilege plaintiff claims under the constitutional provisions, or statutes mentioned, nor do his pleadings indicate upon what theory of construction his recovery depends. It is not alleged that the act of the Territorial Assembly defining the jurisdiction, powers and duties of Territorial Probate Court were void as in conflict with either the Constitution of the United States or with the organic act of Congress creating the territory; no allegation is made that the decree of the Probate Court was not rendered upon due and legal service,

as defined by the probate statute, or that said decree deprives this plaintiff of his property without due process of law. A mere allegation to the effect that the case involves the construction of the United States Constitution or of some federal statute, is not sufficient, as we contend, to indicate what privilege, right or immunity is asserted thereunder; so far as either the original or the amended complaint shows, plaintiff plants his right to overthrow the county's title entirely upon the ground that the decree of the Probate Court was null and void because of lack of jurisdiction as indicated in the allegation above quoted from the original complaint. A case cannot be said to arise under the Constitution of the United States or be controlled by federal statute unless its decision turns upon the construction to be given thereto.

Empire, etc., Mining Co. v. Hawley, 205 U. S. 225, 51 L. Ed. 779.

In order to come within the law as laid down by this court, it must affirmatively appear from plaintiff's pleadings that the case is one substantially and really dependent upon the construction to be given the particular section of the Constitution or the federal statute, and this must be assert-

ed by plaintiff as an issue of fact in his pleadings in logical form, such as required by the rules of good pleading.

Omaha E. & P. Co. v. Omaha, 230 U. S. 123, 57 L. Ed. 1419.

The second ground of the motion to dismiss assumes, but does not admit, that plaintiff's amended complaint sets up, in addition to diverse citizenship other grounds of federal jurisdiction. It is the contention of the county that these additional federal issues, if there be any, having been raised, after jurisdiction in the first instance attached on the grounds of diverse citizenship, that plaintiff in error, by electing to carry his case for review to the Circuit Court of Appeals, instead of directly to this court, if the case is really one involving the Constitution of the United States, has exhausted his right to have the decision of the District Court against him reviewed on appeal, and as a result thereof, that this court is without jurisdiction.

Boise Artesian Hot and Cold Water Co. Ltd. v. Boise City, 230 U. S. 9[illegible]; 57 L. Ed. 1409.

Macfadden v. United States, 213 U. S. 291, 53 L. Ed. 801.

We are aware of the ruling made by this court in the case of *Vicksburg v. Henson*, 231 U. S. 258, 58 L. Ed. 209, but we do not feel that the facts bring this action within the rule of that case.

The third ground will be discussed in the brief on the merits.

It might have been suggested as a fourth ground of dismissal, assuming that by plaintiff's pleadings the case actually involved a construction of the Constitution of the United States, that this court has no jurisdiction, as the Circuit Court of Appeals could have had none, under the statutes. The right of a litigant to appeal, we assume, from the judgment of the district court is purely statutory, and does not exist in the absence of, or, in conflict with the statutory provisions.

Section 128 of the Judicial Act of Congress, of March 3, 1911, declares that Circuit Courts of Appeal shall exercise appellate jurisdiction to review by appeal or writ of error the final decree of the District Court:

> "In all cases other than those in which appeals or writs of error *may be taken* direct to the Supreme Court as provided in Section 238, unless otherwise provided by law."

In Section 238, it is provided that appeals and writs of error may be taken direct from the district court to this court,

> "In any case that involves the construction or application of the Constitution of the United States."

This section uses the words "*may be taken*" in the same sense, we think, it is used in Section 128. The use of the word "may" in the expression, "may be taken," was intended only to confer the right or privilege of appeal to some court.

We contend that if plaintiff in error has stated a case in his pleadings that involves the construction or application of the Constitution of the United States, it could not go to the Circuit Court of Appeals, at his instance under section 128, but if appealed at all must come under Section 238 direct to this court. It is a case that "may be taken" here for review, and if appealed at all by plaintiff must come here to the exclusion of the other court. If the Circuit Court of Appeals had no jurisdiction, this court has none.

The fact that the case is one, also, involving a construction of the federal statutes, can make

no difference. It is still a case that "may be taken" direct to this court.

We have no authorities to submit covering the point, and are advised by the reports that the position seems contrary to the accepted practice. We suggest it to the court with whatever of merit, if any, it may contain.

ARGUMENT ON THE MERITS.

The defendant in error makes the following analysis of the issues raised by the demurrer:

1. The decree of the Probate Court escheating the property to King County is a valid decree, and within the authority and jurisdiction of the Territorial Probate Court. It passed an indefeasible title to the county.

2. The statutes of limitation have run against the alleged rights of the plaintiff in error to maintain this suit.

3. Plaintiff in error is now estopped by laches and procrastination from bringing and maintaining this action.

FIRST PROPOSITION.

Before discussing this proposition, we wish to eliminate one or two features about which there can be no possible controversy:

(a) Lars Torgerson Grotnes had a legal right to voluntarily change his name to John Thompson.

29 Cyc. 271.

Smith v. U. S. Casualty Co., 197 N. Y. 420, 90 N. E. 947, 26 L. R. A. (N. S.) 1170.

Linton v. First National Bank, Etc., 10 Fed. 896.

It might be noted in this connection that no allegation is made that King County or any of its officers, or that the probate court or the administrator of the estate, or in fact any person involved, ever knew that John Thompson had at one time been known by a different name. Such being the case, if the Probate Court acquired jurisdiction over the estate, and by statute was given the authority to enter the decree of escheat, such decree is as effective and binding upon the claim now presented by plaintiff in error, as if his estate had been probated under both names, or under the

name given to him by his parents. This alleged change in name has no bearing upon the issues and matters to be decided in this case.

(b) Whether admitted or not, the pleadings show that the Territorial Probate Court acquired jurisdiction over the estate of John Thompson for the purpose of *probating it.* The Probate Court was a court of record, possessing a seal, and was competent to judge of when its jurisdiction attached.

McGee v. Big Bend Land Co., 51 Wash. 406.

It assumed jurisdiction over the Thompson estate and proceeded to administer it. The regularity of the proceedings had in the Probate Court, leading to the final decree, cannot be questioned in this case on this record.

We find it convenient to present the first proposition under two general heads:

A. Neither the Constitution of the United States nor the organic act passed by Congress March 2, 1853, creating the Territory of Washington, has any application to this case.

B. The Territorial statutes gave authority to the Probate Court under the facts found by it to enter the decree of escheat in favor of the county.

DISCUSSION OF A.

In support of the claim of the plaintiff in error that the Territorial legislature was restricted by the Constitution of the United States, and by the organic act, from passing a law authorizing the Territorial Probate Court to enter decrees of escheat, the attention of this court has been called to Sections 1851, 1907 and 1924, of the Revised Statutes of the United States.

Section 6 of said organic act (Secs. 1851, 1924, R. S.) or so much thereof as had application hereto, reads as follows:

> "And be it further enacted, that the legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil. * * * All the laws passed by the legislative assembly shall be submitted to the Congress of the United States, and if disap-

proved, shall be null and of no effect. * * * To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title." Section 9 of said act (Sec. 1907 R. S.,:

"And be it further enacted, that the judicial power of said territory shall be vested in the Supreme Court, District Courts, Probate Courts, and justices of the peace. The Supreme Court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said territory annually, and they shall hold their offices during the period of four years, and until their successors shall be appointed and qualified. The said territory shall be divided into three judicial districts, and a District Court shall be held in each of said districts, by one of the justices of the Supreme Court, at such times and places as may be prescribed by law; and the said judges shall, after their appointments, respectively, reside in the districts which shall be assigned them. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the Probate Courts and of justices of the peace, shall be as limited by law: Provided, that justices of the peace shall not have jurisdiction of any case in which the title to land

shall in any way come in question, or where the debt or damages claimed shall exceed one hundred dollars; and the said Supreme and District Courts, respectively, shall possess chancery as well as common law jurisdiction."

Congress never disapproved any of the probate acts of Washington Territory. They are to be deemed valid unless so disapproved.

Clinton v. Englebrecht, 18 U. S. 434, 20 L. Ed. 659.

The claim that the territorial legislature was without power to legislate upon the subject of escheats is based upon the restriction found in Section 6, *supra*, that no law should be passed interfering with the primary disposal of the soil. The county claims that this restriction has no possible application to the case. It was only intended by Congress to prevent the territorial legislature from passing laws interfering with the authority of Congress to direct the manner in which the public domain of the United States should be disposed of by the government.

Oury et al. v. Goodwin, 3 Ariz. 255, 26 Pac. 376.

Topeka Commercial Security Co. v. McPherson, 7 Okla. R. 332, 54 Pac. 489.

Crane v. Reeder, 21 Mich. 24.

It is also the claim of the plaintiff in error that if this property escheated at all it should have gone to the United States, and not to the county; and that all statutes in conflict with such alleged right are void under the Constitution of the United States. Some authorities are cited, but they do not sustain the position claimed. In connection with this matter it should be remembered that Congress had not, at the time of this escheat, and has not since, passed any law covering said subject. It has been held by this court that Congress intended to, and did leave, the subject matter of escheat to the several states and territories, and that escheated property must go where the local statutes direct.

Hamilton v. Brown, 161 U. S. 255, 40 L. Ed. 691.

The Supreme Court of Washington, as well as the local federal courts, have recognized the validity of the territorial statutes of 1862, and the power of the Territorial Assembly to enact laws dealing with escheats.

Territory v. Klee, 1 Wash. 183.

Pacific Bank v. Hanna, 90 Fed. 72.

Plaintiff in error claims that the Probate Practice Act of 1862 was void because its title was not broad enough to embrace the matter of escheats or distribution, based on a failure of kindred. Judge Rudkin, of the trial court, answers this contention in his opinion (T. page 15):

> "Mere lapse of time and a proper regard for the stability of titles forbid an inquiry into this question at this late day. All our probate laws have been enacted under similar titles, their validity has been recognized by the courts, and acquiesced by the people, for upwards of half a century, and to overthrow them now would be to unsettle half the titles in the state. Furthermore, if the question were a new one the objection is not tenable. It is conceded that the provision relating to the distribution of estates is within the title, and, if so, it is but a short step to provide to whom distribution shall be made; otherwise, the provision for distribution itself would be wholly inoperative."

As to the last objection, it is claimed by plaintiff in error that under the organic act (Section 9 above quoted), the legislature did not have the power to confer upon the Probate Court authority to enter the decree of escheat. The restriction was as follows:

Section 9. "The jurisdiction of the several courts herein provided for, both appellate and original, and that of the Probate Courts and of justices of the peace shall be as limited by law: Provided, that justices of the peace shall not have jurisdiction of any case in which the title to land shall in anywise come in question. * * *"

The phrase "as limited by law" unquestionably means as fixed by enactments of the territorial legislature, for there was no federal law upon the subject. Only by indirection does the organic act place a limit upon the power of the territorial legislature to give the Probate Court such jurisdiction as it might see fit to grant. We may assume it could not confer either chancery or common law powers. There is nothing in the organic act to prevent the Territorial Assembly from conferring jurisdiction over escheats or the distribution of estates of deceased persons in case of failure of kindred. The organic act places no restriction upon the territorial legislature from conferring the ordinary jurisdiction and powers upon its Probate Courts.

Perris v. Higley, 20 Wallace, 375, 22 L. Ed. 383.

It would be disastrous to many valuable titles in this state for this court to give countenance to the arguments of the plaintiff in error, and to hold that the territorial Probate Court did not have the power in a proper case to distribute the estates of deceased persons to the counties, as provided for in the acts of the territorial legislature. Such is not the policy of the law.

Maynard v. Hill, 125 U. S. 190, 31 L. Ed. 654.

DISCUSSION OF B.

The statutes of Washington Territory authorized the Probate Court to make a finding that Thompson died intestate, and without heirs, and enter a decree of escheat in favor of King County.

The first Probate Practice Act in Washington Territory was passed in 1854. This act was superseded by an act passed in 1862. This was the act in force at the time of Thompson's death, and at the time his estate was escheated, four years later. We will quote such portions of the Probate Practice

Act of 1862 (commencing on page 198), as we deem necessary:

> "Sec. 3. That said Probate Courts shall have and possess the following powers: Exclusive original jurisdiction within their respective counties in all cases relative to the probate of last wills and testaments; the granting of letters testamentary and of administration, and revoking the same; * * * in the settlement and allowance of accounts of executors, administrators and guardians; * * * to allow or reject claims against estates of deceased persons, as hereinafter provided; to award process, and cause to come before said court all and every person or persons whom they may deem it necessary to examine, whether parties or witnesses, or who, as executors, administrators or guardians, or otherwise, shall be entrusted with, or in any way be accountable for any lands, tenements, goods or chattels, belonging to any minor, orphan, or person of unsound mind, or estate of any deceased person, with full power to administer oaths and affirmations, and examine any person touching any matter of controversy before said court, or in the exercise of its jurisdiction. * * *"
>
> "Sec. 4. The said court shall provide and keep a suitable seal."
>
> "Sec. 5. That the court established by this act shall be a court of record, and shall

keep just and faithful records of its proceedings, and shall have power to issue any and all writs which may be necessary to the exercise of its jurisdiction."

"Sec. 7. The judges of the several Probate Courts in the territory shall have power to appoint their own clerks, who shall qualify in the same manner and have the same power, and be entitled to the same fees as are allowed to the clerks of the District Courts for similar services."

"Sec. 8. The judges of the said courts shall have power to make such rules for the transaction of business in said courts as shall not be inconsistent with law."

"Sec. 10. That all process issuing out of the probate court shall be attested by the clerk, and sealed with the seal of the court, and shall be served in the same manner as process issuing out of the District Court."

"Sec. 11. That the probate court shall have the same power and authority under like restriction and rules of law, to enforce and execute their orders, rules, judgments and decrees, as the District Courts of this territory."

"Sec. 12. That said court may enforce by attachment the return of any writ or process, and the payment of any moneys over which it has jurisdiction, and to compel the production or delivery of any papers which

are subjects of, or necessary to its judicial action."

In Chapters 16 and 17 of said act, authority was conferred upon the court to make settlement of the estate, and to enter a decree of distribution. We quote the following sections from said chapters:

"Sec. 317. Upon the settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or any heir, devisee or legatee, the court shall proceed to distribute the residue of the estate, if any, among the persons who are by law entitled."

"Sec. 318. In the decree the court shall name the persons and the portion or parts to which each shall be entitled; and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same in possession."

"Sec. 319. The decree may be made on the application of the executor or administrator, or of any person interested in the estate, and shall only be made after notice has been given in the manner required in regard to an application for the sale of land by an executor or administrator. The court may order such

further notice to be given as it may deem proper."

Subdivision 8 of Section 340 of Chapter 17, page 261, reads as follows:

> "8th. If the intestate shall leave no kindred, his estate shall escheat to the county in which such estate may be situate."

Section 228 of Chapter 12, at page 241, of said act, provides for the notice which must be given in the case of a sale of real property, and by the provisions of Section 319, above, it was made necessary to give this notice before distribution could be decreed.

> Section 228. "When a sale is ordered, notice of the time and place of sale shall be posted in ten of the most public places in the county where the land is situated, at least twenty days before the day of the sale, and shall be published in some newspaper in this territory in general circulation in said county, for three successive weeks before such sale, in which notice the lands and tenements shall be described with common certainty."

We have previously indicated that the Probate Courts of Washington Territory have always assumed jurisdiction over the matter of escheats.

This is also true of the Superior Courts of the state sitting as Probate Courts and acting under the statutes above quoted. (Sec. 1587, et seq., Rem. & B. Code, Washington.)

In brief, under the statute, it is the contention of the county that full authority was conferred upon the territorial Probate Court to find, after statutory notice, that John Thompson died intestate, and without heirs, and to enter a decree of escheat in favor of the county. This interpretation of the statute with regard to the escheat of real property in such cases, is strengthened by reference to subdivision 7 of Section 353, Chapter 18, page 265, of said Act of 1862, providing for the escheat of personal property:

> "If there be no husband, widow, or kindred of the intestate, the said personal estate shall escheat to the county in which the administration is had, and a receipt by the county treasurer of the county to whom the said personal property shall be conveyed by the administrator shall be a full discharge of all responsibility to the said administrator."

This statute clearly intends that the administrator, when so ordered by the Probate Court, shall turn the personal property escheated over to the

county officials, and receive his discharge thereby.

Reference to the decree of escheat entered by the Probate Court in this case will show it was the intention of the court to escheat the property to the county, and to vest title of the same therein.

The decree (T. page 27) recites:

> "More than four years have elapsed since the appointment of said Daniel Bagley as such administrator, and more than four years have expired since the first publication of said notice to creditors."
>
> "That said administrator has fully accounted for all of the estate that has come to his hands, and that the whole estate, so far as it has been discovered, has been fully administered, and that the residue thereof, consisting of the property hereinafter particularly described, is now ready for distribution. That all of the debts of said decedent, and of said estate, and all the expenses of administration thereof thus far incurred, and all taxes that have been attached to or accrued against the said estate, have been paid and discharged, and said estate is now in condition to be closed."
>
> "That said decedent died intestate in the County of King and Washington Territory on

the _____ day of March, A. D. 1865, leaving no heirs surviving him. * * *"

"There being no heirs of said decedent, that the entire estate escheats to the County of King in Washington Territory.

"Now, on this 26th day of May, A. D. 1869, on motion of said Daniel Bagley, administrator of said estate, and no exceptions or objections being filed or made by any person interested in the said estate or otherwise,

"It is hereby ordered, adjudged and decreed: that all the acts and proceedings of said administrator, as reported by this court and as appearing upon the records thereof, be and the same are hereby approved and confirmed; and that after deducting said estimated expenses of closing the administration, the residue of said estate of John Thompson, deceased, not heretofore distributed, hereinafter particularly described, and now remaining in the hands of said administrator, and any other property not now known or discovered which may belong to the said estate, or in which the said estate may have any interest, be and the same is hereby distributed as follows, to-wit: The entire estate to the County of King, in Washington Territory.

"And it is further ordered, that the said administrator, upon payment and delivery of the said residue, as hereinbefore ordered, and upon filing due and proper vouchers and re-

ceipts therefor in this court, be fully and finally discharged from his trust as such administrator, and that his sureties shall thereupon and thenceforth be discharged from all liability for his future acts. * * *"

THOMAS MERCER,
Probate Judge."

It will be noted in this decree the court makes certain findings of fact regarding a due administration of the estate, and that the deceased died without heirs. It also recites that certain documentary evidence was filed by the administrator, and that he was examined at the time of the hearing under oath. At this time, of course, we do not know what particular evidence the court considered in making these findings, but we are bound to assume that it was competent and sufficient to support the conclusions reached.

The decree so recites, and that is sufficient.

McGee v. Big Bend Land Co., 51 Wash. 406, Supra.

Clearly, it was the intention of the Probate Court to enter a decree vesting the title to this property in King County. Furthermore, the court proposed to close up the estate and bring the matters of its administration to an end.

Can this decree of the Probate Court be attacked by the plaintiff in error in this proceeding? It is the contention of the county that it cannot be called in question and that it is final and conclusive against the claim here presented by plaintiff in error.

Plaintiff in error contends that before the estate could be escheated, it was necessary, under the law for the public authorities to bring some proceeding in the nature of an inquest of office, or office found, in some court other than the Probate Court. Such may have been the method pursued at common law, but whether this or some other method shall be resorted to in this country depends wholly upon the statutes of the particular state, or territory, where the property is situated.

Hamilton v. Brown, 161 U. S. 255, 40 L. Ed. 691, Supra.

No one can claim a vested right before death of the intestate in the laws controlling the descent and distribution of property, and such laws and regulations are subject, like rules of the common law, to legislative change at any time.

Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77.

The territorial legislature having spoken upon the subject, the estate must go where directed by the statute. Furthermore, under the statutes in force at the time the estate of John Thompson was escheated no proceeding in the nature of an inquest of office could have been brought to determine the right of escheat. Plaintiff in error has cited the court to Section 480, Chapter 52, of the Session Laws of 1854, page 218, by whose provisions it is claimed it was made the duty of the prosecuting attorney to file such information. The trouble with this contention is that said section, in so far as it referred to escheats, was repealed by the Civil Practice Act of 1862 (Sec. 547). Section 519 of this latter act includes "forfeitures," but omits all reference to "escheats." So that, taken in connection with the change in the Probate Practice Act of 1862, relating to the distribution of estates of persons dying intestate and without heirs, the clear intention of the legislature is manifested to place escheats under the jurisdiction of the Probate Court.

In addition to this express repeal of Section 480, Chapter 52, of the Laws of 1854, it may be noted that under Subdivision 8 of Section 306 of

the Laws of 1854, that the property of a person dying intestate and without kindred went to the territory. This was changed by the Probate Practice Act of 1862, so that instead of going to the territory, it went to the county where the property was situated, while forfeitures went to the territory the same as before. Under this change in the law, it would have been manifestly impossible for the prosecuting attorney to have brought a suit to escheat the Thompson estate to the Territory of Washington.

In the light of these statutory provisions, it seems a waste of time to discuss the citations from other states made by plaintiff in error upon the question of the necessity of an inquest of office or office found. An examination of them will show that they are in general dependent upon the statutes of the particular jurisdiction from which they come, and therefore throw no light upon this controversy.

Since 1862, the legislature has not enacted any law in either the territory or state referring to the matter of escheats, except those found in the various Probate Practice Acts. In 1907 it passed an act (1 R. & B. Code, Sec. 1356, et seq.)

dealing with the subject. This latter act did not take away the jurisdiction of the Probate Courts to declare escheats, but granted an extension of time from twelve to eighteen months for the heirs to appear and lay claim to the property.

As we have already stated, the courts of the territory and of the state have uniformly assumed jurisdiction over escheats, and the right of the state and county to appear in the Probate Courts and contest the claims of the heirs, as against the right of the state and county to an escheat, has been recognized by the highest court of the state.

In re Sullivan Estate, 48 Wash. 631.

The jurisdiction of courts in such matters was not questioned in the case of *Territory v. Klee*, 1 Wash. 183, or in the case of *Pacific Bank v. Hanna*, 90 Fed. 72.

No different effect can be given to the decrees of Probate Courts, made within this jurisdiction, from that given to the decrees of other courts of record. Both are conclusive and binding.

Case of *Broderick's Will*, 21 Wallace, 503, 22 L. Ed. 599.

Such effect has been given to the decrees of the Probate Courts of the State of Washington by the Supreme Court of the State.

In re Osland Estate, 57 Wash. 359.

McGee v. Big Bend Land Co., 51 Wash. 406, Supra.

The case of *Broderick's Will*, supra, is one very similar, in its general aspect, to the case at bar. Senator Broderick died in San Francisco in 1859. On the 20th day of January, 1860, his will was presented and admitted to probate. Large claims were paid against the estate and a decree of distribution entered distributing it to the devisees in the will. Ten years after his death, an action was brought in the courts of California by the heirs-at-law of Broderick to have the will adjudged null and void as a forged and simulated instrument. When the matter was brought to this court for review, the judgment of the Probate Court, distributing the estate as provided by the terms of the will, was held valid as one founded upon statutory service. It barred the claims of the heirs-at-law.

But it is the claim of the plaintiff in error

that it is one thing to hold that a Probate Court has authority to make a conclusive finding as between the conflicting claims of heirs to an estate, and to hold that the Probate Court has authority to make a finding that the intestate died without heirs, and that the estate be escheated. This proposition, however, is unfounded. If it be conceded that the court would have had the authority to declare, as between heirs, or as between the validity of a will and the claim of the heirs, we fail to see why it would not have authority to go one step further and find that there were no heirs, because, under the statutes of descent in the Territory and State of Washington, succession by the county followed as a matter of distribution in that case. By the code, the county stood eighth in the line of descent to the Thompson estate; none of the seven classes possessing higher rights appearing, the county asserted its claim. It filed an affidavit and moved for an escheat, alleging that there were no heirs. This question was thereafterwards presented to the Probate Court as an issue of fact; and upon evidence, a finding was made accordingly, and the prayer of the county granted. Due notice was given to all persons having or claiming to have

any interest in the estate to appear and assert them. No one appearing, the Probate Court forever settled the matter by deciding that Thompson died intestate and without heirs. The decree of the court under the statute was within its lawful authority and jurisdiction, and under the authorities is a complete bar to this action.

THE SECOND PROPOSITION.

The statutes of limitation have run against the rights of the plaintiff in error.

It will be conceded that statutes of limitation are not intended to protect indefeasible titles. There would be no excuse for their existence if they protected that which in law was already good.

Plaintiff in error gives four reasons why the statutes of limitation do not bar his suit. It is first asserted that the possessory acts of the county infringe upon the constitutional inhibition against taking property for public use without due process of law. So far as the authorities show, this proposition has never been asserted before. We deem it without merit. If the title of the county is valid it needs no protection from the statutes of limitation. If void, or voidable, the question remains

whether, when followed by possession for the statutory period, it gives claim of right, or color of title, to the property. If it gives either, and the statute has run, it is a bar to this controversy. That question must be determined without reference to the Constitution of the United States. It is a matter of statutory regulation.

As a second objection, it is asserted that the acts of the county in taking possession of this property, are ultra vires. We assume it is the claim that the possessory acts were unauthorized by statutory law. No specific facts are averred. It is conceded the county uses a part of it for a Poor Farm and Hospital. Caring for the poor, and providing a hospital for their treatment, has always been considered a county purpose both in the Territory and the State of Washington, and is protected by statute. So far as the platting of the property is concerned, we call attention to Section 3848 of Remington & Ballinger's Code, authorizing Boards of County Commissioners to sell escheated property; it does not direct the manner in which it should be sold; and of course, that leaves it to the Board of County Commissioners to sell in the most advantageous way possible. They have done so in this case

by platting the property and selling it in small tracts.

The third claim advanced is that the statute does not run because the county has always recognized the existence of a title superior to its own. Some authorities are cited in support of this contention. With these we have no fault to find, but they are not in point. No facts are pleaded by the plaintiff in error which will support its contention in this respect. The county has never said it did not own the property. It has never admitted that the plaintiff owned it, or that Thompson left heirs who did own it. In proceeding to escheat the estate, the county, through its officers, averred that Thompson died intestate and without heirs, and presented a sworn petition to the Probate Court to that effect. It seems to us the facts plead by the plaintiff in error show the position of the county to have been uniformly opposed to that claimed in the argument.

As a last objection, it is their contention that the decree of the Probate Court constitutes neither claim of right nor color of title to the property in suit. This argument is abundantly answered by the authorities herein cited. We need take no time in discussing the question of title by adverse posses-

sion. It has been held by the Supreme Court of the State of Washington, in passing upon local statutes, that if the entry be under claim of right or color of title, it is sufficient when followed by possession open, notorious, exclusive and adverse for the period fixed by law.

In *Wright v. Madison*, 59 U. S. 50, 15 L. Ed. 280, color of title is defined to be "that which in appearance is title but which in reality is no title." That case, as well as the opinion of this court in the case of *Cameron v. United States*, 148 U. S. 301, 37 L. Ed. 459, emphasizes that the ground of invalidity is unimportant so long as there is an apparent or colorable title. A void deed gives color of title in the State of Washington.

Ward v. Higgins, 7 Wash. 617.

This court gave the Washington statute a similar construction in the case of *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 41 L. Ed. 72. It is the contention of the county that the probate decree, even if void, gave both claim of right and color of title.

Wright v. Madison, Supra.
Breed v. Gregory, 53 Pac. 25.

It was backed up by a public record made by the court in the probation of the Thompson estate, and it is certainly entitled to as much weight and regard as a deed void upon its face. The entire good faith of the county cannot be, and is not questioned.

It has been settled by the court, that, while the statutes of limitation do not run against the state, they do run in favor of the state, and any of its agencies.

Eldridge v. City of Binghampton, 24 N. E. 462.

Mayor of, Etc., v. Carlton, 113 N. Y. 293, 21 N. E. 55.

Rhode Island v. Massachusetts, 4 Howard, 591, 11 L. Ed. 1116.

Under our own statutes, it is unquestioned that they run in favor of the state, and the counties of the state. Presumably, the allegations of plaintiff's complaint are as favorable to his contention as it is possible for him to make them; and at no place in the complaint is it averred that the acts of the county with reference to its possession are subordinate to the title he asserts, nor

is it alleged that the several acts of possession to which he refers were not adverse and in good faith. In fact, the record shows that the county had assumed and had remained in open, notorious and continuous possession of the property at all times since the commencement of the acts mentioned. In the mere matter of the exemption of the property from taxation, intention to assert title is shown by the county. In Section 6 of the organic act creating the territory it was declared, "All taxes shall be equal and uniform; and no distinction shall be made in the assessment between different kinds of property, but the assessment shall be according to the value thereof." No property under this provision could be exempted from taxation unless it belonged to the public. To the same effect are Sections 1 and 2 of Article 7 of the Constitution of the State of Washington. The act placing the property upon the tax rolls of the county as exempt was an open and plain avowal of ownership, and was inconsistent with the theory that any private person had any interest in the land. It has been an act of possession under color of title consistently maintained by the county from the date of the decree of escheat to the present time. If the county

had done nothing else than make this plain avowal of its ownership, its right to protection under the statute of adverse possession would now be complete.

But it is alleged, in addition to this act of possession, that in 1885 the county took physical possession of a certain portion of the tract of land known as the King County Poor Farm, and has occupied such portion and remained from that date onward in the physical possession of it. It is clear from the allegations of the complaint that as to the parts described therein as the King County Poor Farm, as well as the other several tracts later mentioned in the complaint, the county went into possession of it by virtue of the decree of escheat; hence, as we contend, under color of title. It is not alleged with reference to the possession of the King County Poor Farm that we in any way disclaimed our interest in the remainder of the property when we took possession of this specific portion of it. The allegations made in the complaint of the acts of the county with respect to the other portion, repel this inference, rather than favor it.

It is further alleged that about 1900, the defendant in error took possession of a further por-

tion of the tract of land and proceeded to erect the County Hospital upon it, and that the defendant in error, has placed upon the last described tract of land valuable improvements in the shape of a hospital building, with appurtenances, and that at all times since it has used this tract of land for county hospital purposes. (Plaintiff disclaims title to the improvements, but his disclaimer, we take it, should be disregarded.) It is also averred that in 1892, the defendant in error proceeded to plat certain other portions of the property acquired by the county, calling it "King County Addition to the City of Seattle," and after filing said plat with the county auditor of said county, proceeded to sell a large portion of it to private individuals. That in 1893, the defendant in error made a plat of another portion of the land, calling it "King County Second Addition to the City of Seattle." This plat was also placed on record and the county has been selling it to private individuals since. As to the part sold, it is alleged that the county has proceeded to tax the same upon the theory that by its conveyance, title passed to private ownership.

It is further stated and set forth that these several described tracts of land, when taken to-

gether "comprise the whole of the tract herein first above described as being the property belonging to Lars Torgerson Grotnes;" so that it clearly appears from the allegations of the complaint that all of the property which the county received by the decree of escheat has been actually improved by the county, and that in the years gone by, at one time or another, the county has assumed the actual physical control of the entire tract, and that the control it has asserted has been open and notorious. Most of these acts were notorious because they were spread upon the public records; and when this was not done, the county has been in the actual physical possession.

Subdivision 1, Section 26, of the Laws of 1869, page 8, provides that actions for the recovery of real property or for the recovery of possession thereof must be brought within twenty years.

> "No action shall be maintained for such recovery unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized of possession of the premises in question within twenty years from the commencement of the action."

In 1881, by an act of that date (Section 26,

Code of 1881), the period of limitation was reduced to ten years, and in so far as the general statutes of limitation for the recovery of property are concerned, that has been the law of the territory and state ever since.

Now, one who enters upon land under claim and color of title is presumed to own and occupy it according to his title.

1 Cyc. 1146.

The possession of the county, entering under the decree of the Probate Court, even admitting for the sake of the argument that the same is void, would be co-extensive with the boundaries of the property as described in the decree, which included the entire tract.

In 1 Cyc. 1125, the rule is stated as follows:

> "The general rule is well stated that where a party enters under color of title into the actual occupancy of the premises described in the instrument giving color, his possession is not considered as confined to that part of the premises in his actual occupancy, but he acquires possession of all the land embraced in the instrument under which he claims."

There being no adverse allegation in plaintiff's

complaint, this presumption stands in favor of the county. No excuse is made for the long delay of plaintiff, in asserting his claim; no fraud is charged with which to stay the statutes of limitation. It is stated that he did not discover his right of action or his title to the property until within three years of the filing of the suit. There is no allegation of diligence on his part. It is conceded that Thompson left Norway in 1849, and that his relatives had no knowledge or notice of his death, or of the facts and circumstances connected with the probation of his estate, until the time of discovery, three years before the suit. A man leaving his relatives and friends and departing, as Thompson did, to a new country, is presumed dead if unheard of for a period of seven years. What becomes of this presumption in the present case? Did it not charge his relatives with some inquiry or act of diligence to ascertain whether or not he had left an estate in the event of his death; sixty-eight years went by from the time of his disappearance until the time of discovery all unexplained. Under the statutes of the State of Washington fraud and concealment are the only elements which will stay the running of the statutes of limitation. Fraud alone

is not sufficient; there must be acts of concealment which prevent discovery. It has been held that the means of knowledge is the equivalent of knowledge. In this case what possible excuse can there be when all of the acts were matters of public record, open and notorious. The publication of the notice of the order of escheat, and the filing of a decree was notice to the world. The act declaring this public property and exempting it from taxation was a notorious avowal by the county of its ownership.

As stated by this court in the case of *Broderick's Will*, 21 Wallace 503; 21 L. Ed. 599, Supra:

> "What excuse have they for not appearing in the probate court, for example? None. No allegation is made that the notices were fraudulently suppressed, or that the death of Broderick was fraudulently concealed. The only excuse attempted to be offered is that they lived in a secluded region and did not hear of his death, or of the probate proceedings. If this excuse could prevail it would unsettle all proceedings *in rem*. * * * They do not pretend that the facts of the fraud were shrouded in concealment, but their plea is that they lived in a remote and secluded region, far from means of information, and never

heard of Broderick's death, or of the sale of his property, or of any events connected with the settlement of his estate, until many years after these events transpired. Parties cannot thus by their seclusion from the means of information claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem.*"

The necessity of diligence rested upon the plaintiff in error and not upon the county. In the case of *Edgar vs. McCloskey*, 70 Fed. 529, Judge Taft uses this language:

> "It would be a new doctrine indeed if persons in possession under a most notorious, distinct and explicit claim of title in fee in order to make their possession adverse to the world were bound to show the use on their part of due diligence in hunting up unknown heirs and their failure to discover them."

If the county's title has not been made complete by the long lapse of time at this date, no lapse of time can make it so. If the suit can be maintained by plaintiff in error it could be maintained by his

posterity one hundred years hence. What would have become of this property had the county not been decreed its owned. Surely it would have been sold for taxation, and thus passed from the reach of the alleged heirs.

We think, from all standpoints that the court must hold, in spite of the studied allegations of plaintiff's complaint, that the statutes of limitation have run against the right of the plaintiff to maintain this action for the recovery of the property.

THE THIRD PROPOSITION.

Plaintiff in error is now estopped by his laches and procrastination from maintaining this action.

We believe that under the decisions, latches is available as a defense in this action. It has been allowed by this court and applied in cases of ejectment.

Kirk v. Hamilton, 102 U. S. 568; 26 L. Ed. 79.

Dickerson v. Colsgrove, 100 U. S. 578; 25 L. Ed. 618.

We have argued the facts of the case upon which the claims of latches would be based. Lapse

of time is the essence of latches. There are other elements of course, and all are present in this case. The great change in the value of the property, its exemption from the public burdens to the injury of the county; the improvements made upon it by the county; all done in good faith, in reliance upon its title, would seem to make a perfect defense against the plaintiff in error. Plaintiff in error says, however, that the defense of latches cannot be urged in a suit at law in the federal court, and so it is not available to the defendant here. But plaintiff's claim is so stale and ancient, that we feel bound, regardless of this more or less technical objection, to press the point. Defendant in error contends that the unexplained delay of the plaintiff, his procrastination, all amounts to an estoppel on the facts set up, and is available as a defense. This estoppel has become a part and parcel of title in the county.

We respectfully submit this defense, with the others, to the court and pray that the opinion of the Circuit Court of Appeals made herein be affirmed.

JOHN F. MURPHY,
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CHRISTIANSON *v.* KING COUNTY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 67. Argued November 9, 10, 1915.—Decided December 13, 1915.

Where it sufficiently appears from the bill that jurisdiction does not depend solely on diverse citizenship, but the controversy involves the construction of an act of Congress, the decision of the Circuit Court of Appeals is not final, but an appeal lies to this court under § 241, Judicial Code.

As an organized political division of the United States, a Territory possesses only such powers as Congress confers upon it, and the legislature of a Territory cannot provide for escheat unless such provision is within the grant of authority.

A statutory authority to a Territory to legislate upon all rightful subjects of legislation includes the right to provide by legislation for escheat for failure of heirs; and so *held* as to authority given by the Organic Act of Washington Territory.

The prohibition in the Organic Act of Washington of 1853 against interference with the primary disposal of the soil had reference to the disposition of public lands of the United States, and did not limit the right of the Territory to legislate in regard to the escheat of private property for failure of heirs.

Subject to the general scheme of local Government, defined by the Organic Act and the special provisions it contains, and the right of Congress to revise, alter and revoke, the territorial legislatures have generally been entrusted with the enactment of the entire systems of municipal law of the respective Territories of the United States.

Escheat for failure of heirs has always been a familiar subject of legislation in the American commonwealths.

In determining the extent of the power to legislate delegated by Congress to a Territory under the Organic Acts, and the validity of a series of acts of the territorial legislature, it is significant if none of such acts asserting legislative power during the entire period until Statehood were ever disapproved by Congress.

Provisions for escheat for failure of heirs have proper relation to matters embraced in a law establishing probate courts and defining their jurisdiction; and so *held* that such provisions in the statutes of

Washington Territory are not invalid because the title of the probate act was not broad enough to cover escheats.

After reviewing the statutes of Washington Territory in regard to jurisdiction of probate courts, *held* that the decree of the probate court involved in this case decreeing that the property of the intestate escheat to the county for failure of heirs was within its jurisdiction and the decree properly disposed of the property.

Where the legislature has authority to establish its rule as to escheat, it also has power to suitably provide for the tribunals having jurisdiction, and the procedure for determining whether the rule is applicable in particular cases; and if other proceedings are established, office found is not necessary to effect an escheat.

Under the law of the Territory of Washington the property involved in this case escheated to the county in which it was situated.

The proceedings in the Probate Court terminating in a decree that the property of the intestate escheat to the county for failure of heirs being in accord with valid laws of the Territory even though informal, the decree was not void or subject to collateral attack.

The decree of the Probate Court attacked in this case having been entered in a proceeding *in rem* properly conducted with notice and opportunity to parties interested to appear, there was no deprivation of property without due process of law.

Where a court of competent jurisdiction in a proceeding *in rem* under a valid statute determines that there are no heirs to an intestate, the decree binds all the world, including heirs who failed to appear.

203 Fed. Rep. 894.

THIS is a suit, brought in 1911, to recover lands in the City of Seattle, County of King, State of Washington and to quiet title. (See R. & B. Code, Washington, § 785.) The plaintiff claimed title as heir, and grantee of other heirs, of Lars Torgerson Grotnes who died intestate in the County of King, Territory of Washington, in March, 1865. The defendant, the County of King, succeeded the County of King of the Territory which had control of the property pursuant to a decree of escheat which was passed by the Probate Court in May, 1869. The legislature of the Territory had provided that in case of the death of an intestate leaving no kindred his estate should escheat to the county in which it was situated. Washington Laws,

1862-3, p. 262. Demurrer was filed to the amended complaint on the grounds (among others) that the complaint did not state facts sufficient to constitute a cause of action and that the action had not been commenced within the time limited by law. The demurrer was sustained and judgment dismissing the complaint was affirmed by the Circuit Court of Appeals. 203 Fed. Rep. 894.

After alleging title in fee in Lars Torgerson Grotnes, and the fact that he had acquired the land under the name of John Thompson (having changed his name to conceal his identity) through certain mesne conveyances from a grantee of the United States, the amended complaint set forth in detail the proceedings in the Probate Court, which may be summarized as follows: That on March 26, 1865, the Probate Court, upon an informal request of H. L. Yesler and J. Williamson, assumed to appoint Daniel Bagley administrator of the estate of John Thompson, deceased, the order reciting that the decedent had died in the county, intestate, leaving property subject to administration; that after certain intermediate proceedings the administrator presented his petition on February 12, 1869, stating that no heirs at law had been found after diligent search, and praying that the administrator might be discharged and that after due notice the estate might be turned over to the county or such further order made as might be meet; and that on May 26, 1869, after publication of notice for four weeks in a local newspaper, a final decree of distribution was entered which recited the proceedings and continued as follows:

"That said decedent died intestate in the County of King, Washington Territory, on the — day of March, A. D. 1865, leaving no heirs surviving him;

* * * * * * * *

"There being no heirs of said decedent, that the entire estate escheat to the County of King, in Washington Territory.

"Now on this 26th day of May, A. D. 1869, on motion of said Daniel Bagley, administrator of said estate, and no exceptions or objections being filed or made by any person interested in the said estate or otherwise;

"It is hereby ordered, adjudged and decreed: that all the acts and proceedings of said administrator, as reported by this Court and as appearing upon the records thereof, be and the same are hereby approved and confirmed; and that after deducting said estimated expenses of closing the administration, the residue of said estate of John Thompson, deceased, not heretofore distributed, hereinafter particularly described, and now remaining in the hands of said administrator, and any other property not now known or discovered which may belong to the said estate, or in which the said estate may have any interest, be and the same is hereby distributed as follows, to-wit: The entire estate to the County of King, in Washington Territory.

* * * * * * * *

"The following is a particular description of the said residue of said estate referred to in this decree, and of which distribution is ordered, adjudged and decreed, to-wit:

"1st. Cash, to-wit: $343.83 gold coin.

"2nd. And real estate, to-wit: One hundred and sixty acres of land on Duwamish River, in King County, W. T., more particularly described in a certain deed from Joseph Williamson and William Greenfield to John Thompson, dated January 19th, A. D. 1865, and recorded in Volume 1 of the records of King County, W. T., on pages 458, 459 and 460.

"Third. A lease of said land to John Martin, dated March 5th, 1866, on which the entire rent reserved remains due and unpaid.

"Dated May 26th, 1869."

It was alleged that this decree was null and void, that the Probate Court was wholly without jurisdiction to pass

upon the title to the land described or to declare it escheated; that all claims to the land by defendant, and all its acts relating thereto, had been under this assailed decree, and that the defendant had no instrument or judgment purporting to evidence any title in it; that neither the defendant nor any other authority had instituted any suit or proceeding before any tribunal for the purpose of having an escheat declared or its claim of title confirmed. The acts of the county in relation to the land were set forth, the tracts involved being described as the 'King County Farm,' 'King County Hospital Grounds,' 'King County Addition to the City of Seattle,' and 'King County 2nd Addition to the City of Seattle.' The plaintiff did not seek to recover the lands which had been appropriated for railroad rights of way or highways, or that portion which had been sold to innocent purchasers, and it was also conceded that the county might retain the buildings and tangible betterments which it had placed upon the land, as stated.

At the outset, after alleging that the plaintiff was a subject of the King of Norway and that the matter in dispute exceeded in value the sum of $300,000, the amended complaint set forth that the controversy involved the construction of Amendments V and XIV of the Constitution of the United States, and of §§ 1851, 1907 and 1924 of the Revised Statutes of the United States relating to the Territory of Washington.

It was further stated that the heirs of the decedent had no knowledge of his whereabouts or death until three years prior to the beginning of the action, and that the heirs, and particularly the plaintiff, had been diligent since receiving this information in searching for the proofs of the decedent's identity and of their relationship.

Mr. Edward Judd, with whom *Mr. Livingston B.*

Stedman and *Mr. S. S. Langland* were on the brief, for plaintiff in error:

No estoppel or laches were shown.

The county never acquired title by escheat.

The Territory was not a sovereign.

The organic law conveyed no property rights of United States to the Territory.

The territorial escheat act trenched upon the primary disposal of the soil by the United States and the act did not fit its title.

There was never any office found.

The territorial probate court proceedings were void: the organic law did not give jurisdiction to the Probate Court.

The organic law forbade interference with the primary disposal of the soil.

The territorial probate act did not cover escheats.

The probate proceedings were informal and insufficient.

The probate proceedings were not due process of law.

The statute of limitations does not apply.

The county took the property for public use without making compensation.

The county's possession was *ultra vires*.

The county's possession recognized the title of the heirs.

The county had no claim of right nor color of title.

Mr. Robert H. Evans, with whom *Mr. Alfred H. Lundin* and *Mr. John F. Murphy* were on the brief, for defendant in error.

Mr. Justice Hughes, after making the foregoing statement, delivered the opinion of the court.

The motion to dismiss must be denied. It sufficiently appears from the amended bill that jurisdiction did not depend solely upon the citizenship of the respective

parties but that the controversy involved, with other questions, the construction of the act of Congress prescribing the authority of the territorial legislature. In this view, the decision of the Circuit Court of Appeals is not final. *Vicksburg* v. *Henson*, 231 U. S. 259, 267.

The plaintiff in error contends that the land in question did not escheat to the County of King, Territory of Washington, for the reasons (1) that the Territory was not a sovereign, but a municipal corporation, (2) that the organic law of the Territory conveyed to it no property rights of the United States, (3) that the act of the territorial legislature providing for escheat to counties was forbidden by the organic law, (4) that this legislative act was invalid because its title was not broad enough to cover the subject-matter, and (5) that there was never any office found.

There is, of course, no dispute as to the sovereignty of the United States over the Territory of Washington or as to the consequent control of Congress. As an organized political division, the Territory possessed only the powers which Congress had conferred and hence the territorial legislature could not provide for escheat unless such provision was within the granted authority. *Sere* v. *Pitot*, 6 Cranch, 332, 337; *American Ins. Co.* v. *Canter*, 1 Pet. 511, 543; *National Bank* v. *Yankton County*, 101 U. S. 129, 133. The Organic Act (March 2, 1853; 10 Stat. 172, 175; see Rev. Stat., §§ 1851, 1924) provided as follows:

"SEC. 6. . . . That the Legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the

laws passed by the Legislative Assembly shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect: *Provided*, That nothing in this act shall be construed to give power to incorporate a bank or any institution with banking powers, or to borrow money in the name of the Territory, or to pledge the faith of the people of the same for any loan whatever, directly or indirectly. No charter granting any privileges of making, issuing, or putting into circulation any notes or bills in the likeness of bank-notes, or any bonds, scrip, drafts, bills of exchange, or obligations, or granting any other banking powers or privileges, shall be passed by the Legislative Assembly; nor shall the establishment of any branch or agency of any such corporation, derived from other authority, be allowed in said Territory; nor shall said Legislative Assembly authorize the issue of any obligation, scrip, or evidence of debt, by said Territory, in any mode or manner whatever, except certificates for service to said Territory. And all such laws, or any law or laws inconsistent with the provisions of this act, shall be utterly null and void. And all taxes shall be equal and uniform; and no distinctions shall be made in the assessments between different kinds of property, but the assessments shall be according to the value thereof. To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

This manifestly was not a grant of the property of the United States, but it was an authority which extended to "all rightful subjects" of legislation save as it was limited by the essential requirement of conformity to the Constitution and laws of the United States and by the restrictions imposed. The prohibition against interference "with the primary disposal of the soil" defined a limitation which had been established from the beginning in organizing

territorial governments. This provision was found in the Ordinance passed by the Congress of the Confederation, April 23, 1784, for the government of the Western Territory (Amer. Cong., Pub. Journals, Vol. 4, 1782–1788, p. 379) and it was reënacted in the superseding Ordinance of 1787 (Art. IV, 1 Stat. 52, note). It was incorporated either by appropriate reference [1] or by express statement [2] in the organic acts of the Territories, and it was continued in substantially the same words in many of the enabling acts under which States were admitted to the Union.[3] For example, when Wisconsin was admitted, it was stipulated as a condition (9 Stat. 58) that the State should "never interfere with the primary disposal of the soil within the same by the United States," a condition which had its exact equivalent in the provision of other enabling acts that the States should "never interfere with the primary disposal of the public lands" lying within them. (Arkansas, 5 Stat. 51; Iowa, Florida, *Id.* 743; California, 9 Stat. 452.) The restriction had reference to the disposition of the public lands of the United States, and, neither as to State nor as to Territory did these words purport to limit the legislative power, otherwise duly exercised, where property had passed into private ownership and there was no interference with the exclusive authority of Congress in dealing with the public domain. *Carroll* v. *Safford*, 3 How. 441, 461; *Witherspoon* v. *Duncan*, 4 Wall. 210, 218; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 164,

[1] Territory south of the Ohio, 1 Stat. 123; Mississippi, *Id.* 549; Indiana, 2 Stat. 58; Michigan, *Id.* 309; Illinois, *Id.* 514; Alabama, 3 Stat. 371.

[2] E. g., Territory of Orleans, 2 Stat. 284; Missouri, *Id.* 747; Florida, 3 Stat. 655; Wisconsin, 5 Stat. 13; Iowa, *Id.* 237; Oregon, 9 Stat. 325; Minnesota, *Id.* 405; New Mexico, *Id.* 449; Utah, *Id.* 454.

[3] E. g., Missouri, 3 Stat. 547; Arkansas, 5 Stat. 51; Iowa, Florida, *Id.* 743; California, 9 Stat. 452; Wisconsin, 9 Stat. 58; Kansas, 12 Stat. 127.

165; *Crane* v. *Reeder*, 21 Michigan, 24, 74; *Oury* v. *Goodwin*, 3 Arizona, 255, 260; *Topeka Co.* v. *McPherson*, 7 Oklahoma, 332, 338–340. So far as 'the primary disposal of the soil' was concerned, provision for escheat on the death of an owner in fee without heirs could not be deemed to be an interference, whether the provision was enacted by a Territory or by a State.

The scope of the authority conferred upon territorial governments has frequently been described. Subject to the general scheme of local government defined by the organic act, and the special provisions it contains, and subject also to the right of Congress 'to revise, alter and revoke at its discretion,' the local legislature has generally been entrusted 'with the enactment of the entire system of municipal law.' *Hornbuckle* v. *Toombs*, 18 Wall. 648, 655. 'Rightful subjects' of legislation, except as otherwise provided, included all those subjects upon which legislatures had been accustomed to act. *Maynard* v. *Hill*, 125 U. S. 190, 204; *Clinton* v. *Englebrecht*, 13 Wall. 434, 442; *Cope* v. *Cope*, 137 U. S. 682, 684; *Walker* v. *Southern Pacific R. R.*, 165 U. S. 593, 604. Unquestionably, authority was granted to the Territory to legislate with respect to the devolution of real property on the death of the owner. Thus in *Cope* v. *Cope*, *supra*, where the validity of an act of the territorial legislature of Utah permitting inheritance by illegitimate children was sustained, it was said by the court, after referring to the restrictions of the Organic Act: "With the exceptions noted in this section, the power of the territorial legislature was apparently as plenary as that of the Legislature of a State. *Maynard* v. *Hill*, 125 U. S. 204. The distribution of and the right of succession to the estates of deceased persons are matters exclusively of state cognizance, and are such as were within the competence of the territorial legislature to deal with as it saw fit, in the absence of an inhibition by Congress." Escheat on failure

of heirs was a familiar subject of legislation in the American Commonwealths. The rule of the common law in this respect, as in others, was subject to modification, and adaptation to local conditions was essentially a matter of legislative policy. In the case of the Territories, Congress could have dealt with this subject if it chose, but it did not see fit to establish a rule of its own. The matter, however, remained a 'rightful subject' of legislation and Congress did not except it from the broad grant of legislative power. Assuming that it had authority, the Legislative Assembly of the Territory of Washington at its first session provided in its article on "Descent of Real Estate" that "if the intestate shall leave no kindred, his estate shall escheat to the Territory." Statutes of Washington Territory, 1854, p. 306. Similar provision was made in the case of personalty. *Id.*, p. 308. In 1860, it was enacted that if the intestate should leave no kindred his real estate should escheat to the county in which it was situated and his personal estate to the county in which the administration was had. Washington Laws, 1859–60, pp. 222, 224. These provisions were reënacted in the "Probate Practice Act" of 1863. Washington Laws, 1862–3, pp. 262, 265. By the Code of 1881, the estate on failure of heirs was to escheat to the Territory "for the support of the common schools" in the county in which the decedent resided or where the estate was situated. Section 3302, Eighth. It is significant that these acts, thus asserting the legislative power from the time of the organization of the Territory until it became a State, were never disapproved by Congress.

It is urged that to sustain the legislative authority to enact legislation of this character would be contrary to the principles declared in the case of the *Mormon Church* v. *United States*, 136 U. S. 1. But this contention is without basis. In that case, the suit was brought pursuant to an act of Congress and it was pointed out that Congress had expressly declared in the earlier act of 1862 that all real

estate acquired by the corporation contrary to its provisions should "be forfeited and escheat to the United States." *Id.*, p. 47. Our attention is also directed to statements in the opinions in *Williams* v. *Wilson*, 1 Martin & Yerger, 248, 252, and *Etheridge* v. *Doe*, 18 Alabama, 565, 574, but neither of these cases involved the question of the validity of territorial legislation for escheat. In *Lee* v. *Territory*, 2 Montana, 124, the act of the Territory by which it was attempted to forfeit placer mines held by aliens was declared to be invalid, but the controlling consideration was that its provisions were repugnant to the authority and action of Congress with respect to the disposition of the public lands. See also *King* v. *Ware*, 4 Northwestern, 858, 860. On the other hand, in *Crane* v. *Reeder*, 21 Michigan, 24, 76, the legislation of the Territory of Michigan providing for escheat on failure of lawful heirs was found not to be in conflict with the Ordinance of 1787 or with any act of Congress. And, so far as the question has been considered with regard to the Territory of Washington, the authority of the legislature has been upheld. *Pacific Bank* v. *Hannah*, 90 Fed. Rep. 72, 79; see *Territory* v. *Klee*, 1 Washington, 183, 188.

It is also objected that the title of the act here involved was not sufficient under the last provision of § 6 of the Organic Act above quoted. (Rev. Stat., § 1924.) The statute under which the proceeding was had was entitled "An Act defining the Jurisdiction and Practice in the Probate Courts of Washington Territory." Washington Laws, 1862–3, p. 198. It covered the whole subject of probate practice, of wills, of descent, and of distribution. We are of the opinion that the matter of escheat for failure of heirs did have "proper relation" to the other matters embraced in the statute, and that the object was adequately expressed in the title within the meaning of the organic law. The objection that there was no 'office found' is not substantial, save as it may be deemed to

raise the question whether there was compliance with the territorial legislation which we shall presently consider. If the legislature had authority to establish its rule as to escheat, it was also competent for it suitably to provide as to the tribunal which should have jurisdiction and the procedure for determining whether the rule was applicable in a particular case. *Hamilton* v. *Brown*, 161 U. S. 256, 263.

Concluding that escheat in the case of death of an owner without heirs was a rightful subject of legislation within the meaning of the Organic Act—not inconsistent with the Constitution and laws of the United States and not embraced within the stated exceptions—and that the provision in the Probate Practice Act was a valid exercise of the authority thus granted, we are brought to the question as to the jurisdiction of the Probate Court to enter the decree set forth in the amended complaint, and as to the effect of that decree.

Section 9 of the Organic Act (10 Stat. 175; see Rev. Stat., § 1907) provided that the 'judicial power' of the Territory should be vested 'in a supreme court, district courts, probate courts, and in justices of the peace,' and that the jurisdiction of these courts, including the probate courts, should be 'as limited by law.' The territorial legislature, having the power to define the jurisdiction of the probate courts, provided in the act which was in force at the time of the proceedings in question that these courts should have original jurisdiction within their respective counties over probate proceedings, the granting of letters testamentary and of administration, and the settlement of accounts of executors and administrators (Probate Practice Act of January 16, 1863, § 3; Washington Laws, 1862-3, p. 199). On qualification, an administrator was entitled to the immediate possession of the real estate as well as of the personal estate of the deceased, and to receive the rents and profits until the estate was settled

or delivered over by order of the Probate Court to the heirs or devisees (*Id.*, § 165, p. 228). At any time subsequent to the second term of the Probate Court after the issue of letters, any heir might present his petition to the court asking for his share of the estate (*Id.*, § 309, p. 256); and the act contained the following express provisions for distribution, which related to both real and personal property:

"Sec. 317. Upon the settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or any heir, devisee or legatee, the court shall proceed to distribute the residue of the estate, if any, among the persons who are by law entitled.

"Sec. 318. In the decree the court shall name the person and the portion, or parts to which each shall be entitled; and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same in possession."

Those 'by law entitled' to the real estate were described in § 340 [1] (*Id.*, pp. 261, 262) which gave the order of taking

[1] This section provided:

"Sec. 340. When any person shall die seized of any lands, tenements, or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, as follows:

"1st. In equal shares to his children, and to the issue of any deceased child, by right of representation, and if there be no child of the intestate living at the time of his death, his estate shall descend to all his other lineal descendants; and if all the same descendants are in the same degree of kindred to the intestate, they shall have the estate equally, otherwise they shall take according to representation.

"2d. If he shall leave no issue, his estate shall descend to his father."

(Then follow paragraphs 3d, 4th, 5th, 6th and 7th with respect to kindred of different degrees.)

"8th. If the intestate shall leave no kindred, his estate shall escheat to the county in which such estate may be situate."

according to relationship and in the last paragraph provided for escheat to the county if there were no kindred. It does not seem to be disputed, that under this act, if proceedings in a probate court were properly initiated, that court would have jurisdiction to enter a decree determining the interests of heirs and distributing the real estate to those of the kindred, if any, who were found to be entitled to take as provided in this section. This jurisdiction formerly exercised by the probate courts of the Territory has been continued in the superior courts of the State, sitting in probate. R. & B. Code, Washington, § 1587 *et seq.* See *Stewart* v. *Lohr*, 1 Washington, 341, 342; *Balch* v. *Smith*, 4 Washington, 497, 500, 502; *Hazelton* v. *Bogardus*, 8 Washington, 102, 103; *In re Sullivan's Estate*, 48 Washington, 631; *In re Ostlund's Estate*, 57 Washington, 359, 364, 366. Speaking of the essential nature of this proceeding for distribution and describing the decree if rendered upon due process of law as final and conclusive, the court said in the case of *Ostlund's Estate*, *supra*: "Its very object and purpose is to judicially determine who takes the property left by the deceased." See also *Alaska Banking Co.* v. *Noyes*, 64 Washington, 672, 676; *McDowell* v. *Beckham*, 72 Washington, 224, 227; *Krohn* v. *Hirsch*, 81 Washington, 222, 226. But it is contended that the County, asserting escheat, did not claim as successor to the decedent; that the jurisdiction of the Probate Court ceased as soon as it ascertained that there were no heirs, and that it had no power to declare the escheat and decree distribution to the County. We cannot accede to this view. It is not the case, in a proper sense, of an attempt to determine the title of third persons, that is, of adverse claimants. *Stewart* v. *Lohr*, *supra*. The provision for escheat to the county in case the intestate left no kindred was a part of the scheme of distribution defined by the act and we cannot doubt that not only had the court the power to determine the interests of the

heirs in the real estate to be distributed, but it likewise had the power to determine whether there were heirs and if it was found that there were none to decree distribution according to the statute.

It is insisted that § 480 of the Civil Practice Act of 1854 (p. 218) prescribed the procedure in relation to escheats; that is, it provided for the filing of an information by the prosecuting attorney in the District Court and for proceedings like those in civil action for the recovery of property. This section applied whenever property should "escheat or be forfeited to the territory," but in 1860, the Civil Practice Act of 1854 was repealed (§ 500, Washington Laws, 1859–60, p. 103), and in the provision which corresponded to § 480 of the former act the word 'escheat' was struck out (§ 472, p. 98). In the Civil Practice Act of 1863, this provision, without the reference to escheat, was continued (§ 519, Washington Laws, 1862–3, p. 192) and it is found in the same form in the Code of 1881 (§ 713). It appears that from 1863 to the year 1907 (see R. & B. Code, § 1356) there was no provision in the laws of either the Territory or the State in relation to escheat, save those found in the Probate Practice Acts; and the act of 1907 did not disturb the jurisdiction of the court which had the administration of the estate. Referring to this, it is stated by the district judge that "the probate courts of the Territory and the superior courts of the State have uniformly assumed jurisdiction in this class of cases, and the right of the State or county to appear in the probate proceeding and contest the rights of other claimants has been recognized by the highest court of the State." 196 Fed. Rep., p. 799, citing *In re Sullivan's Estate*, 48 Washington, 631. See also *Helm* v. *Johnson*, 40 Washington, 420, 421.

Deeming it to be clear that the Probate Court had jurisdiction to declare an escheat and to distribute the real property to the county when it was found that the intestate had left no kindred (Probate Practice Act, 1863,

§§ 317, 318, 340, 8th, p. 262), we pass to the remaining question with respect to the proceedings that were actually taken in that court in connection with the property in controversy. It is objected that the petition for the appointment of an administrator was informal; that it did not set forth the jurisdictional facts; that it was signed by persons not shown to have any interest in the estate, and asked for the appointment of another 'stranger'; and that hence the court never acquired jurisdiction and that its appointment of the administrator and its subsequent proceedings were null and void. But it is not disputed that the real property was within the county. The owner, a resident of that county, had died. The order of appointment recited that he had died intestate. As a court of record (*Id.*, § 5, p. 200) having capacity to administer, its jurisdiction over the subject—as has been said by the Supreme Court of the State of Washington with reference to the Probate Court of the Territory [1]—"carries with it the presumption of the integrity of the judgment, the same as does the judgment of a court of general jurisdiction." *Magee* v. *Big Ben Land Co.*, 51 Washington, 406, 409, 410. Despite the informality of the petition, the appointment of the administrator was not void, and not being void it is not subject to collateral attack. *Magee* v. *Big Ben Land Co., supra; Grignon's Lessee* v. *Astor*, 2 How. 319, 339; *Florentine* v. *Barton*, 2 Wall. 210, 216; *Comstock* v. *Crawford*, 3 Wall. 396, 403; *McNitt* v. *Turner*, 16 Wall. 352, 366; *Veach* v. *Rice*, 131 U. S. 293, 344; *Simmons* v. *Saul*, 138 U. S. 439, 457; 4 Bac. Abr. 96; *Pick* v. *Strong*, 26 Minnesota, 303; *Morgan* v. *Locke*, 28 La. Ann. 806; *Riley's Admr.* v. *McCord's Admr.*, 24 Missouri, 265. It appears that subsequently the Probate Court, after opportunity had been afforded to discover

[1] The reference is to the Probate Court of the Territory as it existed under the Code of 1881, but its jurisdiction was not essentially different from that of the Probate Court under the earlier Probate Practice Act.

heirs, entertained a petition of the administrator for final account and distribution. The statutory notice (Probate Practice Act, 1863, § 319) was published and on the return day the proceeding was duly continued and, on hearing, the decree was entered settling the account, finding that there were no heirs, and directing distribution of the real property, as described, to the County of King. This proceeding was essentially *in rem*. *In re Ostlund's Estate*, *supra*; *Alaska Banking & Safe Deposit Co.* v. *Noyes*, *supra*; *McDowell* v. *Beckham*, *supra*; *Krohn* v. *Hirsch*, *supra*. It was competent for the court to inquire whether there were heirs, and if there were such to determine who were entitled to take according to the order prescribed by the statute, and also, if it was found that there were no heirs, to make the distribution to the County as the statute required. It is apparent that there was no deprivation of property without due process of law. The court, after appropriate notice, did determine that there were no heirs and its decree being the act of a court of competent jurisdiction under a valid statute bound all the world including the plaintiff in error. It cannot be regarded as open to attack in this action. *Grignon's Lessee* v. *Astor*, *supra*; *Florentine* v. *Barton*, *supra*; *Caujolle* v. *Ferrié*, 13 Wall. 465, 474; *Broderick's Will*, 21 Wall. 503; *Simmons* v. *Saul*, *supra*; *Goodrich* v. *Ferris*, 214 U. S. 71, 80, 81.

As, in this view, the judgment of the court below must be affirmed, we do not find it necessary to consider the questions that have been argued with respect to the application of the Statute of Limitations.

Judgment affirmed.